Canada and the New Constitution

The Unfinished Agenda

Edited by STANLEY M. BECK
& IVAN BERNIER

Volume 1

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VOLUME ONE

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Foreword

As Dean Beck and Dean Bernier say in their Introduction to these volumes, "the unfinished agenda of constitutional change in this most fractious of federal states" remains very much what it was in 1978, when the project leading to this collection of studies was started.

The protracted conferences and discussions on constitutional change started in February 1968. They were begun largely, if not entirely, because of an acute sense of dissatisfaction in Quebec with the federation and with the place of Quebec and French Canada within it. That dissatisfaction reached its culmination in two events: the election of the Parti québécois government in November 1976 on a program of achieving "sovereignty-association" and the Quebec referendum of May 1980. In the appeal by Canadian leaders from Ottawa and many provinces to the people of Quebec to vote 'No' on the referendum, the citizens of Quebec were told that such a vote would not be a vote for the *status quo*: it would be a vote for a 'renewed federalism'. No one defined exactly what that renewal would involve, but the people of Quebec who did vote 'No' could be pardoned for assuming that it meant some change along the lines that had been urged by Quebec governments of many political persuasions over the years from 1968. In the result, the Conferences of First Ministers of September 1980 and November 1981 produced no agreement on any such issues. Our 'patriated' Constitution contains no reflection of any of the demands that had been put forward by Quebec governments to meet dissatisfaction in that province.

It is quite possible that the leaders and the people of Quebec may turn their attention to more urgent things and leave the Constitution aside for some time to come. However, it would be dangerous to believe that the issue is settled. Indeed, the Conference of 1981 and the 'patriation' of 1982 may well create an array of new grievances that, over time, could become a mythology of betrayal, isolation, and imposition. There probably was no better alternative in the circumstances, but the fact remains that the elected government of Quebec was isolated and alone in November 1981. It is also a fact that both the Charter of Rights and the new amending formula were 'imposed'.

It will be the part of wisdom — and also the part of justice — at some time to return to the discussion of constitutional change and renewal. Apart from the problems of Quebec, there are aspects of the grievances of the West that could be addressed through the Constitution. We badly need a new second chamber to replace our Senate, where there can be clear, loud, and authoritative voicing of Western views, uninhibited by the party discipline of the House of Commons. Such a House could do much to give our central institutions of government a legitimacy that they do not now have in the West. It would be as dangerous to ignore that need as it would be to ignore our failure thus far to provide the 'renewal' promised to the people of Quebec.

If these volumes contribute to further thought and discussion on these problems, they will have achieved their most important purpose.

Ottawa
June 1982.

GORDON ROBERTSON

Avant-propos

Comme l'affirment MM. Beck et Bernier dans leur introduction à ces volumes, « l'ordre du jour inachevé du changement constitutionnel dans cet État fédéral si indocile » ne diffère pas tellement de ce qu'il était en 1978 lorsque ont débuté les travaux devant mener à ce recueil.

C'est en février 1968 que se sont amorcées les discussions et les conférences interminables sur le changement constitutionnel en raison avant tout d'un sentiment profond d'insatisfaction des Québécois face à la fédération et à la place du Québec et du Canada français. Cette insatisfaction a atteint son apogée lors de deux événements : l'élection du parti québécois en novembre 1976, qui promettait de réaliser la souveraineté-association, et le référendum québécois de mai 1980.

Dans les appels lancés par les dirigeants canadiens à Ottawa et dans de nombreuses provinces afin que les Québécois votent *non* lors du référendum, on affirmait qu'un tel vote n'équivaudrait pas à un vote pour le *statu quo* : ce serait plutôt un vote en faveur d'un *fédéralisme renouvelé*. Personne n'avait défini précisément ce renouveau, mais on peut excuser les Québécois qui ont voté *non* d'avoir pris pour acquis qu'il s'agirait d'un changement conforme à ceux que prônaient les divers gouvernements qui s'étaient succédé à Québec depuis 1968. Toutefois, les conférences des premiers ministres de septembre 1980 et de novembre 1981 n'ont plus permis d'en venir à une entente sur ces questions. Notre constitution rapatriée ne fait aucune place aux exigences formulées par les gouvernements québécois en vue de donner satisfaction à cette province.

Il est fort possible que les dirigeants et la population du Québec se penchent sur des problèmes plus urgents et mettent de côté la constitution pour quelque temps. Il serait cependant dangereux de croire que la question est réglée. À vrai dire, la conférence de 1981 et le rapatriement de 1982 pourraient bien donner lieu à une autre série de griefs qui, avec le temps, pourraient façonner une mythologie de trahison, d'isolement et de supercherie. Compte tenu des circonstances, on n'avait peut-être pas le choix; il n'en demeure pas moins que le gouvernement élu du Québec s'est retrouvé seul et isolé en novembre 1981. Il est également vrai que la Charte des droits et la nouvelle formule d'amendement ont été « imposées ».

Il ne serait que sage — et juste — de reprendre, dans un avenir plus ou moins rapproché, la discussion du changement et du renouveau constitutionnels. Outre les problèmes du Québec, la constitution pourrait permettre de répondre à certains aspects des doléances de l'Ouest. Nous avons grand besoin d'une nouvelle seconde chambre pour remplacer le Sénat afin de permettre aux points de vue de l'Ouest de se faire entendre avec force, clarté et autorité sans les entraves de la discipline de parti de la Chambre des communes. Une telle assemblée pourrait aider nos institutions centrales à acquérir une légitimité dont elles ne jouissent pas dans l'Ouest. Il serait aussi dangereux d'ignorer ce besoin que de faire fi de notre omission, à ce jour, à accorder aux Québécois le « renouveau » promis.

Si ces volumes favorisent la réflexion sur ces problèmes et leur discussion, ils auront atteint leur principal objectif.

Ottawa
Juin 1982

GORDON ROBERTSON

Introduction

STANLEY M. BECK
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Introduction

The Constitutional Change Project, as it was originally titled, had its genesis at Osgoode Hall Law School, York University, in the fall of 1978. Although that took place only some four years ago, constitutional events that have occurred since that date make the critical national issues that were then a matter of fervent debate seem, at first glance, to present problems now requiring only 'housekeeping' solutions. Canada's Constitution is home, an amending formula is in place, and the functional reality of the Charter of Rights remains to be worked out by the courts and Legislatures.

When one gives further consideration, however, to the unfinished agenda of constitutional change in this most fractious of federal states, one sees that that agenda is not much different from what it seemed to Canadians in early 1978. Certainly the referendum on sovereignty-association has come and gone, and we have escaped the crisis and trauma that a majority 'Yes' vote would have meant. However, the Parti québécois has recently made it abundantly clear that the drive for sovereignty, or a variation of it, is far from dead, and that in one form or another, the question will again be put to the people of Quebec. Thus the questions of sovereignty-association, of sovereignty pure and simple, and of 'special status', whatever that might mean, are still very much with us. National economic problems and exhaustion from constitutional debate will undoubtedly put further major constitutional negotiations in the background for the time being. The nature of our polity, however, ensures that such negotiations cannot remain in the shadows for long. There are still major questions to be settled, and we are far from being out of the constitutional woods.

No sophisticated observer of the national scene believes that it is only with Quebec that there remains unfinished constitutional business. The election of an avowedly separatist candidate to the Alberta Legislature is a rude reminder that there are fundamental discontents from coast to coast. Some, although certainly not all, of these discontents may well find partial solution in political and constitutional restructuring of such institutions as the House of Commons, the Senate, the Supreme Court of Canada, federal administrative agencies such as the National Energy Board and the Canadian Radio-television and Telecommunications Commission, the federal public service, and federal-provincial consultative mechanisms, to name but a few of the more obvious areas for possible change. These are likely to be the first areas of reform when constitutional discussions resume, and the study papers in this collection will, we hope, be a useful contribution to that process. The issues surrounding the distribution of powers cannot be put off for ever. Indeed, it seems likely to us that constitutional discussions will eventually focus on changes that will be more fundamental to federal-provincial relationships than any that have taken place so far. When these issues and changes do surface for consideration, these study papers may provide material helpful to the debate that must follow. And perhaps more important, by giving us a clearer picture of the kind of problems we may have to face if the long-promised constitutional revision does not take place, these studies may serve as a stimulant for further action.

In relation to future constitutional change that has been sketched above, the Project on Constitutional Change has as much, and possibly even more, relevance and timeliness than it had when it was first conceived in 1978. It is true that the project was motivated by the impending Quebec referendum and the sense that Canada was facing the four constitutional options that formed the framework of the study:

- Rearrangement of division of powers or governmental institutions under a federal structure
- Special status for one or more provinces or regions
- Sovereignty for Quebec
- Sovereignty for Quebec that included formal association with Canada.

The moving idea for the project was that while many individuals were concerned with models of constitutional change, and various committees, both private and public, were putting forth proposals, few people were asking what impact the various constitutional options might have on the country's political, economic, social, and cultural character. Thus it was decided that the project was to be an impact study. Eight major areas were chosen for consideration:

1. Social Services and Welfare
2. Regulation of the Economy
3. Administration of Justice
4. Language, Communication, Culture, and Human Rights
5. Natural Resources
6. Composition and Relationships of Federal/Regional/Provincial/Municipal Institutions
7. External Affairs
8. Mechanisms for Drawing Up a New Constitution

Each of the eight areas was to be examined in the context of each of the four options for constitutional change. In retrospect the scope of the project outlined was far too ambitious and impossible of complete fulfilment. Its range was simply too broad as it involved looking at almost the whole of Canadian society in terms of the impact of four general hypotheses of constitutional change.

Apart altogether from the breadth of the study, a serious problem of definition quickly surfaced: What was meant by sovereignty-association? Would we necessarily accept the definition put out by the Parti québécois in its working paper? How could our authors make any intelligent forecast of impact without knowing what the reaction of the rest of Canada would be to that definition and what form sovereignty-association would actually take? The same concerns obviously apply to sovereignty for Quebec and to special status. Thus, although the project was not conceived as one of constitution making, we were soon forced into a form of that very activity since, if impacts were to be assessed, working premises had to be made concerning what political form the changes would actually assume.

When the studies came to be written, it quickly became clear that the scholars involved, like humankind generally, were most comfortable with what was familiar to them: that is, existing institutions and arrangements; they were least comfortable with the unknown and what it might bring: that is, sovereignty or sovereignty-association for Quebec. The papers were often excellent analyses of the current situation and of suggestions for reform, but had relatively little to say when it came to examining the possible impact on a particular area of sovereignty or sovereignty-association. Clearly the approach taken in the individual papers is not always consistent with the project's original design, and there is, moreover, considerable variation in approach among the papers themselves. Thus the completed project turned out to be quite different from the study as it had originally been conceived. We do not think that its value is any the less for that. We believe that, taken together, the papers constitute a worthwhile contribution to the on-going debate on constitutional change in Canada, and that the problems they identify and the solutions they examine are valuable for the constitutional debate to come. In this connection the authors and editors wish to point out that all references in these papers to the British North America Act 1867 (and following) should now read 'the Constitution Act 1867 (and following)'.

Not all of the papers originally written for this project have been published in this collection. Those from Group 8, "Mechanisms for Drawing Up a New Constitution," were published separately as a monograph, *Mécanismes pour une nouvelle constitution* (Éditions de l'université d'Ottawa, 1981).

The original group that met to discuss the project at Osgoode Hall Law School of York University in the fall of 1978 included Stanley M. Beck as chairman, Professors Peter Hogg, Walter Tarnopolsky, Donald Smiley, Ramsay Cook, and Peter Russell. We are grateful to them for the encouragement they gave in pressing forward with the project, but only wish that they had been firmer in warning that our undertaking was too ambitious and our subject needed more structure and refining.

It was our desire from our first meeting that the project be jointly undertaken with a group of scholars from Quebec. To that end, we were able to persuade Professor André Tremblay of the Faculté de droit, université de Montréal, to join the project as co-chairman, and to secure the co-sponsorship of that faculty and of the université de Montréal, along with that of Osgoode Hall Law School and of York University. Without Professor Tremblay's co-operation and effort, and the joint sponsorship of the université de Montréal, the project would not have proceeded, and we are grateful for their support. Unfortunately, soon after the project was funded and work was begun, Professor Tremblay became heavily involved in Quebec politics as one of the chief constitutional advisers to Claude Ryan and subsequently one of the authors of the Quebec Liberal Party's Proposals for Constitutional Reform. His duties in those capacities prevented Professor Tremblay from carrying on as co-chairman of the project, and his place was taken by Professor Ivan Bernier of the Faculté de droit, université Laval. Substantially fewer scholars from Quebec than we expected actually contributed to this undertaking. It may be that in the aftermath of the election of the Parti québécois, few Quebec scholars were keen on attempting yet another study of the Constitution in a perspective that could be seen as one of defence of existing institutions. The variety of views and the abundance of criticism expressed in the various studies that make up this book will show that the real intent of the project was quite different.

The Co-ordinating Committee of the project was made up of the following members:

Stanley M. Beck Osgoode Hall Law School York University	Co-Chairmen	
Ivan Bernier Faculté de droit Université Laval		
Stefan Dupré University of Toronto	*Group 1*:	Social Services and Welfare
Gilles Pacquet Carleton University	*Group 2*:	Regulation of the Economy
Peter Hogg Osgoode Hall Law School York University	*Group 3*:	Administration of Justice
Walter Tarnopolsky University of Ottawa	*Group 4*:	Language, Communication, and Culture
Guy Lord Université de Montréal	*Group 5*:	Energy and Natural Resources
Donald Smiley York University	*Group 6*:	Composition and Relationships of Federal/Regional/Provincial/Municipal Institutions
Ivan Bernier Université Laval	*Group 7*:	External Affairs

Edmond Orban Université de Montréal	*Group 8*:	Mechanisms for Drawing Up a New Constitution
Herbert Marx Université de Montréal		
Ramsay Cook York University		
Peter Russell University of Toronto		

The Donner Canadian Foundation provided the financing for the project, and the understanding and encouragement of Donald Rickerd and Gerald Wright of that Foundation were essential to the project's successful completion. We thank them for their enlightened sponsorship.

We would also like to express our appreciation to Gordon Robertson and The Institute for Research on Public Policy for agreeing to publish the project papers and for their editorial guidance.

Ann Montgomery, the Administrative Assistant to Stanley M. Beck, acted as a one-person secretariat for the project, and we are all in her debt for cheerful and smooth organization.

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Introduction

Le projet de changement constitutionnel, comme on l'appelait à l'origine, a vu le jour à l'école de droit Osgoode Hall à l'université York à l'automne de 1978. Bien que cela ne remonte qu'à quatre ans, les événements constitutionnels qui sont survenus depuis permettent de croire, à première vue, que les questions nationales décisives qui étaient alors l'objet d'un débat animé posent aujourd'hui des problèmes n'exigeant que des solutions courantes. La constitution du Canada est rapatriée, la formule d'amendement est en place, et la réalité fonctionnelle de la Charte des droits devra être déterminée par les tribunaux et les assemblées législatives.

Toutefois, lorsque l'on pousse un peu plus l'étude de l'ordre du jour inachevé du changement constitutionnel dans cet État fédéral si indocile, on voit que celui-ci ne diffère pas tellement de ce qu'il apparaissait aux Canadiens au début de 1978. Certes, le référendum sur la souveraineté-association est chose du passé, et nous avons échappé à la crise et au traumatisme qu'aurait entraîné un vote majoritaire en faveur du *oui*. Cependant, le parti québécois a récemment manifesté sans l'ombre d'un doute que sa quête de la souveraineté, sous une forme ou une autre, est loin d'être achevée, et que les Québécois auront encore à répondre à la question ou à une variante. Ainsi, les questions de la souveraineté-association, de la souveraineté pure et simple et du statut particulier, quoi que cela veuille dire, sont toujours très présentes. Les problèmes économiques nationaux et l'épuisement provoqué par le débat constitutionnel relégueront sans doute les négociations constitutionnelles à l'arrière-plan pour l'instant. La nature de notre régime politique veut cependant que de telles négociations ne puissent demeurer dans l'ombre trop longtemps. Il reste de grands problèmes à résoudre et, en matière de constitution, nous ne sommes pas sortis du bois.

Aucun observateur averti de la scène nationale ne croit que c'est uniquement le Québec qui a encore des comptes constitutionnels à régler. L'élection d'un candidat franchement séparatiste à l'Assemblée législative albertaine nous rappelle sans détour que certains mécontentements fondamentaux se retrouvent partout au pays. Quelques-uns, mais évidemment pas tous, pourraient être réglés en partie par une restructuration politique et constitutionnelle d'institutions tels le Sénat, la Chambre des communes, la Cour suprême du Canada, les organismes administratifs fédéraux tels le Conseil de la radiotélévision et des télécommunications canadiennes, la Commission nationale de l'énergie et la Commission de la Fonction publique et les mécanismes de consultation fédéraux-provinciaux pour n'en nommer que quelques-uns. Lorsque reprendront les discussions constitutionnelles, ce sont là les domaines qui risquent d'être abordés en premier, et les textes de ce recueil aideront, nous l'espérons, à ce processus. On ne peut remettre aux calendes grecques les questions entourant la répartition des pouvoirs. À vrai dire, il semble fort probable que les discussions constitutionnelles porteront éventuellement sur des changements encore plus fondamentaux pour les relations fédérales-provinciales que ceux qui sont survenus jusqu'à maintenant. Lorsque ces questions et ces changements feront enfin l'objet de discussions, ces textes pourraient donner matière au débat qui s'ensuivra. Fait plus important peut-être, en brossant un tableau plus complet du genre de problèmes auxquels nous pourrions faire face si la révision constitutionnelle tant promise n'a pas lieu, ces textes pourraient encourager d'autres démarches.

En ce qui a trait aux changements constitutionnels futurs qui ont été évoqués ci-dessus, le projet de changement constitutionnel est aussi pertinent et actuel, sinon davantage, qu'il ne l'était en 1978. Il est vrai que le projet a été motivé par l'approche du référendum québécois et le sentiment que le Canada était face à quatre options constitutionnelles qui tracent le plan de l'étude :

- une nouvelle répartition des pouvoirs ou des institutions de l'État dans une structure fédérale,

- un statut particulier pour une ou plusieurs provinces ou régions,
- la souveraineté du Québec,
- la souveraineté du Québec comprenant une association officielle avec le Canada.

L'idée maîtresse du projet voulait que, même si de nombreux particuliers se préoccupaient des modèles de changement constitutionnel et que divers comités, tant privés que publics, élaboraient des propositions, peu de gens se préoccupaient des conséquences des différentes options constitutionnelles pour le tissu politique, économique, social et culturel du pays. On a donc décidé que le projet devait constituer une étude d'impact et l'on a choisi de se concentrer sur huit domaines :

1. les services sociaux et le bien-être,
2. la réglementation de l'économie,
3. l'administration de la justice,
4. le langage, la communication, la culture et les droits de la personne,
5. les ressources naturelles,
6. la composition des institutions fédérales, régionales, provinciales et municipales et leurs rapports,
7. les affaires extérieures,
8. les mécanismes d'élaboration d'une nouvelle constitution.

Chacun des huit domaines devait être étudié dans le contexte de chacune des quatre options de changement constitutionnel. En rétrospective, l'ampleur du projet était beaucoup trop grande et sa réalisation complète impossible. Il voulait trop englober en ce qu'il exigeait de tenir compte des répercussions de quatre hypothèses générales de changement constitutionnel sur la société canadienne sous presque tous ses aspects.

Outre l'ampleur de l'étude, un grave problème de définition est rapidement apparu : que voulait dire la souveraineté-association? Fallait-il accepter nécessairement la définition proposée par le parti québécois dans son document de travail? Comment nos auteurs pouvaient-ils prévoir intelligemment les répercussions sans connaître la réaction du reste du Canada à cette définition et la forme que prendrait dans les faits la souveraineté-association? Les mêmes préoccupations valaient évidemment pour la souveraineté du Québec et le statut particulier. Ainsi, sans vouloir rédiger une nouvelle constitution, nous avons rapidement dû prendre cette tangente puisque, s'il fallait évaluer les répercussions, nous avions besoin d'hypothèses de travail concernant la forme politique que prendraient les changements.

À l'étape de la rédaction, il est rapidement devenu évident que les chercheurs en cause, comme l'humanité en général, étaient plus à l'aise avec ce qu'ils connaissaient bien, c'est-à-dire, les institutions et les dispositions existantes. Ils étaient moins confortables face à l'inconnu et à ses conséquences, c'est-à-dire, la souveraineté ou la souveraineté-association pour le Québec. Les documents constituaient souvent d'excellentes analyses de la situation actuelle et offraient de bonnes suggestions pour la réforme sans toutefois pouvoir vraiment définir les conséquences possibles de la souveraineté ou de la souveraineté-association dans un domaine particulier. Il est évident que l'approche adoptée dans les textes individuels ne concorde pas toujours avec la conception originale du projet, sans compter la variété considérable d'approches des textes eux-mêmes. La réalisation du projet a donc donné des résultats fort différents de ce qui était prévu. Nous ne croyons pas que cela lui enlève quelque valeur que ce soit. Nous croyons que, dans l'ensemble, les textes constituent un apport valable au débat permanent sur le changement constitutionnel au Canada, et que les problèmes qu'ils définissent et les solutions qu'ils examinent serviront au débat constitutionnel à venir. Ainsi, les auteurs et les éditeurs tiennent-ils à souligner que tout renvoi à l'Acte de l'Amérique du Nord britannique 1867 (et ce qui suit) doit maintenant se lire « l'Acte de la Constitution 1867 (et ce qui suit) ».

Ce recueil ne renferme pas tous les textes écrits à l'origine dans le cadre du projet. Ceux du groupe huit, « Les mécanismes d'élaboration d'une nouvelle constitution », ont été publiés séparément dans une monographie intitulée *Mécanismes pour une nouvelle constitution* (Ottawa, Éditions de l'université d'Ottawa, 1981).

Le groupe original qui s'est rencontré pour discuter du projet à l'école de droit Osgoode Hall de l'université York à l'automne de 1978 comprenait Stanley M. Beck en tant que président, de même que les professeurs Peter Hogg, Walter Tarnopolsky, Donald Smiley, Ramsay Cook et Peter Russell. Nous leur sommes reconnaissants de l'encouragement qu'ils ont accordé dans la réalisation du projet, mais nous aurions souhaité qu'ils nous préviennent davantage du caractère trop ambitieux de nos travaux et du besoin de structurer et de préciser davantage notre sujet.

Dès le début, nous avons voulu que les études se fassent conjointement avec un groupe d'universitaires québécois. À cette fin, nous avons pu persuader le professeur André Tremblay de la faculté de droit de l'université de Montréal de s'associer au projet comme coprésident et obtenir le coparrainage de la faculté et de l'université de Montréal ainsi que de l'école de droit Osgoode Hall et de l'université York. Sans la collaboration et les efforts du professeur Tremblay et le coparrainage de l'université de Montréal, l'étude n'aurait pu être menée à terme : nous les remercions de leur appui. Malheureusement, peu après le début des travaux, le professeur Tremblay s'est impliqué profondément dans la politique québécoise en tant qu'un des principaux conseillers constitutionnels de Claude Ryan et, par la suite, un des auteurs du projet de réforme constitutionnelle du parti libéral du Québec. Ses responsabilités à ce titre ont empêché le professeur Tremblay de continuer comme coprésident de l'étude, et il a été remplacé par le professeur Ivan Bernier de la faculté de droit de l'université Laval. Les contributions d'auteurs québécois ont été considérablement moins nombreuses qu'on ne l'aurait cru. Il se peut que, suite à l'élection du parti québécois, il y ait eu peu d'intérêt à entreprendre encore une autre étude de la constitution dans une perspective dans laquelle on aurait pu y voir une justification des institutions existantes. La gamme de points de vue et l'abondance de critiques exprimés dans les différents textes qui composent ce livre montreront que l'intention réelle du projet était tout autre.

Le comité de coordination du projet se composait des membres suivants :

Stanley M. Beck École de droit Osgoode Hall, université York	Coprésidents	
Ivan Bernier Faculté de droit Université Laval		
Stéfan Dupré Université de Toronto	*Groupe 1* :	les services sociaux et le bien-être
Gilles Paquet Université Carleton	*Groupe 2* :	la réglementation de l'économie
Peter Hogg École de droit Osgoode Hall, université York	*Groupe 3* :	l'administration de la justice

Walter Tarnopolsky Université d'Ottawa	*Groupe 4* :	le langage, la communication et la culture
Guy Lord Université de Montréal	*Groupe 5* :	l'énergie et les ressources naturelles
Donald Smiley Université York	*Groupe 6* :	la composition des institutions fédérales, régionales, provinciales et municipales et leurs rapports
Ivan Bernier Université Laval	*Groupe 7* :	les affaires extérieures
Edmond Orban Université de Montréal	*Groupe 8* :	les mécanismes d'élaboration d'une nouvelle constitution
Herbert Marx Université de Montréal		
Ramsay Cook Université York		
Peter Russell Université de Toronto		

La Fondation Donner Canada a assuré le financement de l'étude, tandis que la compréhension et l'encouragement de Donald Rickerd et de Gerald Wright de cette fondation se sont avérés essentiels à la réalisation du projet. Nous leur sommes reconnaissants de leur parrainage éclairé.

Nous aimerions aussi exprimer notre appréciation à Gordon Robertson et à l'Institut de recherches politiques pour avoir accepté de publier les textes de l'étude et pour leurs conseils rédactionnels.

Ann Montgomery, l'adjointe administrative de Stanley M. Beck, a assuré à elle seule le secrétariat du projet, et nous lui sommes tous redevables pour son organisation souriante et efficace.

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Central Institutions

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Central Institutions

Introduction: From Interstate to Intrastate Federalism

This paper deals with central government institutions under two very different kinds of circumstances. Most of the analysis is concerned with the Canadian federal system and proposed reforms within the limits of federalism. The latter and much shorter part of the paper examines in an inevitably hypothetical and speculative way the common institutions of Canada and a sovereign Quebec. In this treatment of federalism, the perspective is wider than that ordinarily taken by students of constitutional matters and includes such topics as the internal operations of the Canadian House of Commons, the composition of the federal Cabinet and bureaucracy, and the relations between the federal and provincial wings of the political parties.[1] There *is* a case for the piecemeal reform of our political institutions, but the current context of debate is one of comprehensive change. And within this context there is no defensible reason for limiting one's attention to those institutions and processes that are commonly regarded as constitutional.

The most influential scholarship on federalism in the English-speaking world tends to explain a 'federation' almost exclusively in terms of the constitutional definition of the powers of national and regional governments. The "three leading characteristics of completely developed federalism" have been summarized as "the supremacy of the constitution . . . the distribution among bodies with limited and co-ordinate authority of the different powers of government . . . the authority of the Courts to act as interpreters of the constitution."[2] (This definition of federalism is accepted by the writers of two widely used case-books on Canadian constitutional law that are subtitled "Cases, Notes and Materials on the Distribution and Limitation of Legislative Powers under the Constitution" and "Cases, Text and Notes on the Distribution of Legislative Power."[3]) In the first of these texts, the emphasis on the division of powers is so exclusive that only the sections of the British North America (BNA) Act dealing directly with this matter are printed in the Appendix. Another influential text treats 'federal government' rather than juridical forms alone and defines the 'federal principle' as "the method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent" provided that both general and regional governments "operate directly upon the people."[4]

Yet the perspective cited above ignores a very important dimension of the experience of federal countries: the part that provinces, states, or regions take in the operations of a central government and, even more to the point, the responsiveness of central authorities to territorially delimited attitudes and subnational interests. Significantly the issue that the founders of both the United States of America and the Dominion of Canada found most difficult to resolve was *not* the division of powers between the national and state/provincial governments, but rather the composition of the second legislative chamber. Both nations agreed on representation by population in the lower House, but faced almost irreconcilable differences among larger and smaller jurisdictions about the make-up of their respective Senates. A more general work on the founding of federal régimes states: "Because control of the central legislature is a major element in the control of central power, the organization of the central legislature has proved a contentious issue during the creation of every federation."[5] Canada's provinces, the descendants of its colonies, have been concerned with the structure and function of the institutions of the central government that gave importance to the second chamber, but extended beyond it.

In this paper the two perspectives will be termed 'interstate federalism' and 'intrastate federalism'.[6] The former is concerned with the federal-provincial division of powers, the latter with the reflection of provincial/regional aspirations and interests in the structure and operations of the central government. A somewhat similar distinction has been made between 'parliamentary' and 'pluralist' federal systems. 'Parliamentary' federations, such as the British Commonwealth and West Germany, are characterized by the concentration of power within each level of government. The 'pluralist' federations, such as the United States and Switzerland, are based on the principle that "political authority should be dispersed among multiple centres of power: not simply between central and state institutions, but also among a variety of central institutions."[7]

Between 1960 and the coming to power of the Parti québécois in 1976, most constitutional debate in Canada centred on the division of powers between the federal and provincial governments, that is, on questions of interstate federalism. There were, however, some exceptions to this.

- In his speech to the Federal-Provincial Conference of November 1963, Premier Lesage of Quebec proposed that the provincial governments be given the opportunity to participate in the formation of national economic policies.[8] This participation would take place through permanent federal-provincial institutions responsible for "tariff structures, transportation and even the monetary policies of Canada," responsibilities that up to that point were considered to belong exclusively under federal jurisdiction.
- In his opening speech delivered to the Federal-Provincial Constitutional Conference on 5 February 1968, Prime Minister Pearson proposed that comprehensive review of the Constitution be undertaken in three sequential stages: first, the extended constitutional protection of human and linguistic rights; secondly the reform of the "central institutions of Canadian federalism"; thirdly the division of powers between federal and provincial governments.[9] By the 'central institutions of Canadian federalism', the Prime Minister meant the Parliament of Canada, the federal public service, the Supreme Court of Canada, and the institutions of the National Capital Region. His general intent was that these institutions might better reflect Canada's underlying linguistic, cultural, and regional diversities.
- The Special Joint Committee of the Senate and House of Commons in its 1972 *Report* on the Constitution made major recommendations relating to the central government. The Senate should be restricted to a suspensive veto over bills passed by the House of Commons, and the Senators allotted to

each province or territory "should be appointed by the Federal Government from a panel of nominees submitted by the appropriate Provincial or Territorial Government."[10] In addition the provinces should participate in the choice of members of the Supreme Court of Canada.

These recommendations in the direction of intrastate federalism had little impact on constitutional debate in the years before 1976. It appears that the Lesage government did not press the recommendations for provincial participation in national economic policies that it made at the 1963 conference. In the federal-provincial review of the Constitution between 1968 and 1971, the process came to be dominated by division-of-powers questions, and subsequently the *Report* of the Joint Committee gave rise to little debate.

Since November 1976 several proposals for comprehensive constitutional reform have been made public: the Trudeau government's Bill C-60,[11] the report of the Committee on the Constitution of the Canadian Bar Association,[12] proposals of the Ontario Advisory Committee on Confederation,[13] the proposals of the Government of Alberta,[14] the report of the Task Force on Canadian Unity,[15] the proposals of the Government of British Columbia,[16] and the document *A New Canadian Federation* published by the Quebec Liberal Party.[17] All these documents recommend reform in the institutions of the Government of Canada. Thus intrastate federalism may truly be called "an idea whose time has come."[18]

Interstate Federalism, the Confederation Settlement, and its Aftermath

In contemporary discussions of constitutional reform in Canada, the Confederation settlement of 1864–1867 is given little weight. To take an important example, there is almost no reference to the 'compact' or 'contract' theory of Confederation that was central to Canadian constitutional debate before the 1930s. Neither has judicial review of the Constitution been much criticized in terms of whether or not the judicial authorities have interpreted the letter or the spirit of the Confederation settlement according to its original intent. Yet even if we do not accord to Confederation any *normative* status as guide to what Canadians now and in the immediate future may appropriately do, the original constitutional settlement is a useful bench-mark for analysing our political institutions as they have developed.

The Fathers of Confederation were the first to establish a political community combining federalism with adherence to British parliamentary procedures. Canada thus became the first of the 'parliamentary federations'.[19] The Confederation settlement that established this new kind of political entity was a mix of interstate and intrastate elements. As far as the former were concerned, there is ample evidence that most of the English-speaking politicians — certainly almost all of those from Upper Canada — would greatly have preferred a 'legislative union', but that the French Canadians would not agree to this arrangement.

The interstate elements of the Confederation settlement can be summarized as follows:

- Most of the legislative powers conferred on the provinces were related either to matters of marked difference of opinion between English-speaking and French-speaking Canadians or to the functions usually performed by local governments. These initial areas of provincial authority were identified through the experience of the Act of Union period. Those legislative powers perceived as relating directly to cultural differences were conferred on the provinces, while those that were expected to unite or divide Canadians on other than the French-English axis were conferred on the Dominion.
- Relations between the Dominion and provincial governments were to be patterned after those between the Imperial government and the British colonies. The Lieutenant-Governors of the provinces were to be appointed by the Imperial government. Sections 55 and 90 of the BNA Act provided for the retention and removal of provincial legislation by Dominion authorities according to the accepted patterns of Imperial rule within the British Empire.

It has been argued that by the 'federal principle' the Fathers of Confederation did not mean co-ordinate levels of government[20] as this principle was later elucidated.[21] As far as British North Americans applied this meaning to federalism, they rejected it on the basis of their judgements about the experience of the United States: "most of the members of the Canadian Coalition government thought of federation largely in terms of the composition of the central legislature. In the lower house there would be 'rep by pop', in the upper house there would be representation by territory . . . The bases of the federal principle lay in the central legislature and in the balance between the House of Commons on the one hand and the Senate on the other."[22] As far as the French Canadian ministers were concerned, the rights of their community would be safeguarded less by the division of legislative powers between the Dominion and the provinces than by their presence and that of their successors in the Dominion Cabinet: "Taché, Cartier, Langevin, all cabinet ministers in the existing Canadian government, felt that the presence of French Canadian ministers in the future central cabinet was a guarantee sufficient to resolve any difficulty that might involve the rights of the French."[23] It may be concluded, then, that the French Canadian leaders at the time of Confederation acted on the basis of intrastate, rather than interstate, federalism.

Let us look briefly at the institutions of the Dominion government as they emerged at Confederation and in the years immediately following.

The Cabinet

The politicians who attended the Westminster Conference of 1866 had decided on the composition of the first Dominion Cabinet. It was agreed that the Cabinet was to be limited to thirteen members since the maximum number on former executive councils of Canada had been twelve, and the Prime Minister was added to this total. More important was the establishment of a provincial membership. Ontario was to have five members, including the Prime Minister; Quebec was to have four, and the Maritime provinces two each.[24] Although, under the traditions of British parliamentary government, the BNA Act itself did not provide for provincial membership in the Cabinet, this principle was an important element of the Confederation settlement.

Between the enactment of the BNA Act by the Parliament of the United Kingdom in March 1867 and its coming into effect on 1 July of the same year, the Governor General of Canada, Lord Monck, decided that there was to be a single head of government in the new Dominion and that ministries headed by representatives of Upper and Lower Canada, which had developed under the Act of Union, were to be discontinued.[25] No British North American politicians seem to have opposed this change.

In the first Cabinet and those that succeeded it for perhaps sixty-five years, many, if not most, of the ministers had important bases of political support in their own provinces or regions. Departments of government were small, and what we would now call the 'policy role' of ministers either in relation to their own departments or to the more general conduct of the government was not very important. The situation immediately after Confederation was as follows: "The minister at that time was primarily a politician, and only to a minor degree an administrator. To accomplish the work of the cabinet, it was necessary for each member to have influence in some important section of the province and in some important body of interest or opinion. Hence the cabinet was not only free to be political, it was of necessity highly political — and to be political successfully, it had to be representative."[26]

Again, it has been said of the first Dominion government: "It would have been wrong to suppose that Macdonald was leading a centralized party. He was rather the chief of a coalition of groups in which each obeyed a regional leader, rather than Macdonald himself. To keep the confidence of the majority, Macdonald knew that he must negotiate with these leaders. In this spirit the cabinet was to be, in a certain sense, a chamber of political compensation, where the provincial spokesmen traded their support for national policies in return for concessions to their region."[27]

The preoccupation of Canadian politicians at the time of Confederation and for some decades after, and the glue that held the political parties, if not the country, together, were patronage dispensed most generously by Cabinet ministers in their respective provinces.

> Since there was little government, the burden of administration and law-making was light, and the leaders of the political party in power, the cabinet, devoted most of their time and energy to the intricate task of holding together a majority in the legislature and of employing, for this purpose, the patronage at the disposal of the government. In this society . . . the principal role [*sic*] of political life was not the administration of existing law and the making of new law, but the rewarding of those who took part in political life by the distribution of patronage. Patronage was a natural currency of public life, and the power to dispense it was what, for the most part, gave a cabinet minister the authority he deserved. Sir Wilfred Laurier's biographer wrote of the Laurier administration, "The distribution of patronage was the most important single function of the government."[28]

The House of Commons

By contemporary standards there was a lack of party discipline and party cohesion in the House of Commons immediately after Confederation.[29] This situation may have been a natural result of the circumstances in the Legislatures of the British North American colonies in the years immediately after their attainment of responsible government when the "opportunism, fluidity and possible alignments among groups, factions and 'parties' " gave the assemblies power to make and unmake governments.[30] Much of this fluidity remained in the first decade after Confederation: "Party discipline was still somewhat weak around the edges: there were enough 'loose fish', 'shaky fellows' and 'ministerialists' that many votes in the House of Commons were far from foregone conclusions. For example, in the first four sessions of the first Parliament, the Macdonald government was defeated six times on minor government bills, and twice on resolutions for supply. (The government did not resign or advise dissolution of [*sic*] any of these.) In fact, three of those defeats came on motions by Members of Parliament who could have been regularly identified as supporters of the government."[31] The parliamentary parties in the years after Confederation were successors of groups that had developed in the United Province of Canada before 1867, and it took these central Canadian parties some time to strike roots in the Maritime and Western regions.

The foundations for party discipline and cohesion in the House of Commons were laid by legislation passed in 1878 that provided for the secret ballot and simultaneous elections in all constituencies.[32] Under the procedures by which the general elections of 1867, 1872, and 1874 were conducted, the government was able to schedule early elections in ridings where it was strong in the hope of persuading voters in other constituencies to elect 'ministerialists'. To the 1878 enactments have been attributed the beginnings of "structured parliamentarianism: Parliament structured in its essentials by parties."[33] Thus cohesive and disciplined parties rather than independent M.P.'s became and have remained the decisive actors in the House of Commons.[34]

The Senate

At the Quebec Conference in the fall of 1864, six of the fourteen days of discussion were devoted to the composition of the proposed second chamber. The Upper Canadian leaders would not have agreed to Confederation except on the basis of representation by population in the House of Commons as a remedy for the most serious grievance of their section under the constitutional arrangement of the Act of Union. The Lower Canadian and Maritime politicians, however, demanded compensation for their agreement to this crucial principle of "rep. by pop." George Brown said in the Confederation debates, "Our Lower Canadian friends have agreed to give us representation by population in the Lower House, on the express condition that they shall have equality in the Upper House. On no other condition could we have advanced a step."[35] The pressures of the Maritime colonies were at least as strong, and at the Quebec Conference their delegates used every strategem to try to establish a second chamber that would effectively safeguard the rights of these political communities against the arrangements that gave control to a majority of the House of Commons and other institutions of the government of the Dominion. The leaders of the smallest colony, Prince Edward Island, were most insistent on this point and proposed both the equality of provincial representation in the second chamber and the direct election of its members.

It is not very useful to speculate about the manner in which the Fathers of Confederation intended the new second chamber to work. It is probable that individual expectations differed. Despite the urgent wish of the Lower Canadian and Maritime politicians to establish a Senate that would effectively guard the rights of the provincial communities, it is reasonable to conjecture that "Macdonald and other leaders who favoured a strong union . . . saw in appointment [of the Senate] by the federal government the means of weaning the sections from their particularisms" since "sectional representation and nomination of the central government were irreconcilable in principle."[36] Despite these different expectations, the Senate was constituted under the BNA Act as follows:

- Equality of regions rather than of provinces was guaranteed. Under the BNA Act Ontario, Quebec, and the two Maritime provinces received twenty-four Senators each. This principle of regional equality was extended by an amendment of 1915 that gave the four Western provinces together twenty-four seats in the second chamber. Even among the delegates of the Maritime colonies, only Prince Edward Island supported the

American principles of equal provincial representation and the choice of Senators by the provincial Legislatures.

- In section 23(6) of the BNA Act, it was provided that a Senator appointed from Quebec "shall have his Real Property Qualification in the Electoral District for which he is appointed, or shall be resident in that Division." The twenty-four Divisions were apparently agreed upon by the Lower Canadian delegation in the negotiations that preceded Confederation. This division into districts, which had no counterpart in the other provinces, was designed to ensure representation from both English-speaking and French-speaking residents of Quebec.
- The independence and, in a sense, the strength of the Senate were protected by several provisions. Section 39 enacted that "A Senator shall not be capable of being elected or of sitting or voting as a Member of the House of Commons." The Senate was given the same range of powers as the Commons with the sole exception that any bill for raising or appropriating public revenues must originate in the House of Commons. The permanent equality of the regions represented in the Senate was guaranteed by section 28, which limited the total number of Senators. Although the British government feared the possibility of deadlocks between the two chambers of the Canadian Parliament, the only preventive measure that the British North American politicians could be brought to agree on was the provision of sections 26 and 27; these sections permitted the Governor in Council to appoint either three or six additional Senators on condition that if such extra appointments were made, the equality of regional representation must be preserved. Taken together, sections 26, 27, and 28 prevented any future federal Cabinet from breaking a deadlock that might arise between itself and the combined Houses or the Senate by swamping the latter body with appointees amenable to the government's will.
- It is probable that many, if not most, of the British North American politicians of the 1860s were more concerned about the Senate as a defender of the rights of property than as a protector of the provincial communities. Senators were required to possess $4000-worth of unencumbered real property in the province from which they were appointed; in Quebec the property requirement applied, as noted above, to the Division a Senator represented. Although the Legislative Council of the Province of Canada had been chosen by popular election from 1856 onward, there was, apart from

Prince Edward Island, almost no resistance to the provision that Senators be appointed.

In general the Senate's beginnings as a body in which specifically provincial or regional interests would be represented are uncertain. As we have seen, the equality of members among Ontario, Quebec, and the Maritime provinces was guaranteed, although within Quebec itself this equality was combined with provisions directed at securing a balance between British Canadian and French Canadian Senators. On the other hand, the appointment of Senators by the Governor General — in effect, by the Governor General acting on the advice of the Prime Minister — denied Senators any real claim to be considered the representatives of provincial legislatures, governments, or electorates.

The Departmental Civil Service

The Dominion civil service in the years immediately after Confederation was drawn largely from among those who had been officials of the United Province of Canada. It has been said of the expectations of the British North Americans at Confederation, "The new central government for the Dominion of Canada was simply an expansion of the government of the old Province of Canada."[37] The legacy of the administrative development of Canada during this period had two major consequences for the representative character of the public service in the new Dominion.[38]

First, although there were relatively few Maritimers in the new federal bureaucracy, "that there was surprisingly little outcry from the Maritimes for a share of the positions (read 'patronage') in the new federal public service is probably due to the very slow development of centralized services."[39] Secondly the division of several of the most important departments of government between Upper and Lower Canada in the Act of Union period "lessened the blow of the transition from provincial to federal jurisdiction" and provided a foundation for what was called then and for some time afterward the 'outside civil service', that is, the departments of the bureaucracy located outside Ottawa. This division had been effected in such departments as Public Works, Indian Affairs, Immigration, Customs and Excise, and the Fisheries Branch.

Despite its contributions to bureaucratic inefficiency, and despite the dominance in the early Dominion civil service of officials from Ontario and Quebec, the patronage principle[40] contributed considerably to a service that was responsive to territorially based interests and that included members from various parts of Canada. The Cabinet, as we have seen, embodied the principle of provincial representation, and patronage contributed to the responsiveness of appointed officials to ministers. The relation between patronage and responsible government in the early days of the Dominion was expressed in a private statement made by Sir John A. Macdonald in 1871: "I think that in the distribution of governmental patronage we carry out the true constitutional principle [of responsible government]. Whenever an office is vacant it belongs to the party supporting the Government, if within that party there is to be found a person competent to perform the duties. Responsible government cannot be carried on on any other principle."[41]

The Subsequent Development of Central Institutions

The Cabinet

From Confederation onward Canadian Prime Ministers, in choosing their Cabinets, have provided for provincial membership. The bottom line, so to speak, is that even the smallest province is entitled to be represented in at least one Cabinet post, except where a province fails to elect a single member to the government side of the House of Commons. Of course the claims of the larger provinces to more than one Cabinet post have also been recognized. In the period since Confederation, Quebec and Ontario have each had a number of Cabinet ministers roughly proportionate to their number of residents; the Atlantic provinces have been more than proportionately represented, and the Western provinces less.[42] This last situation has arisen from the tendency of Westerners to elect members of minority parties.

From time to time, factors other than provincial representation have been taken into account in composing Cabinets. For example, before the Second World War, it was recognized that a representative of Irish Catholics was entitled to a post; within the Province of Quebec, Montreal, Quebec City, and the English-speaking community have been represented; and in recent years the claims of women and of persons of ethnic origins other than French and British have been recognized. Yet these claims have usually been regarded as less binding on a Prime Minister than were those of provincial membership.

The size of the Cabinet has steadily grown from the thirteen ministers of the early years after Confederation to about thirty in recent governments. Much of this growth can, of course, be attributed to the increasing scope and complexity of government activity. But a factor that has been at least as important is that of provincial membership. Thus the British practices of appointing ministers not of Cabinet rank and of creating an 'inner Cabinet' were not adopted until the formation of the Clark government in 1979. The inner Cabinet of ten members, as originally established by Prime Minister Clark, did not include a minister from British Columbia, but some few days later John Fraser was made a member of the group, although his portfolio as Postmaster General and Minister of the Environment would seem not to have entitled him to inclusion.

In the period between 1867 and 1965, Quebec was represented by 32 per cent of the total number of ministers in Canadian Cabinets.[43] Although this figure corresponds to the relatively stable proportion of Canadians resident in Quebec, it does little to represent the balance between French and non-French membership, for Quebec ministers include both anglophones and francophones. Furthermore, in the century following Confederation, French Canadians had been most consistently appointed to the portfolios of the Post Office, Public Works, Marine and Fisheries, Justice, the Secretariat of State, the Presidency of the Privy Council, and the Solicitor-Generalship.[44] Several of these portfolios enjoyed the disposal of a great deal of patronage, and none was critical to social or economic policy. On the other hand, no French Canadian had ever been appointed to Finance, Trade and Commerce, or Labour, three departments as old as Confederation.

In the Trudeau administration French Canadians were given portfolios crucial to general social and economic policy. Thus, from the beginning of this administration, francophones were appointed to such ministries as Industry, Trade and Commerce; Finance; Regional Economic Expansion; Energy, Mines and Resources; National Health and Welfare; Communications; Indian Affairs and Northern Development; and to the position of President of the Treasury Board. The Minister of Industry, Trade and Commerce in the Clark government was a francophone from Ontario.

A detailed examination[15] has established that the French lieutenants of such British Canadian leaders as John A. Macdonald and Mackenzie King did not attain the status of co-Prime Minister. This applies even to Cartier between 1867 and his death in 1873, to Lapointe from 1935 to his death in 1941, and to St. Laurent between 1941 and 1948. Without compromising the prerogatives of the prime-ministerial office as these are understood in the British parliamentary tradition, Macdonald and King *did* confer on Cartier and Lapointe respectively a definite hegemony over the Quebec members in the Cabinet and authority over matters directly related to that province. However, this very special pattern of relations that allowed Lapointe and Cartier to influence more general government policies in some ways did not in any sense mean a return to the 'co-Prime Minister' system that had developed under the Act of Union. Furthermore other British Canadian Prime Ministers did not have French Canadian lieutenants in the sense that this position was held by Cartier, Lapointe, and St. Laurent, although some Prime Ministers tried, with widely varying degrees of urgency, to find such a colleague. Despite the interest that Prime Minister Clark showed in increasing French Canadian representation in his Cabinet, he gave no public indication that he was seeking a single minister to be his Quebec lieutenant.

But the more basic questions remain: What *does* provincial membership in Cabinet mean under contemporary conditions? How important *are* ministers in representing and expressing the interests that are specific to the provinces and regions they are supposed to represent? The general answer is that over a long period of time, the effectiveness of ministers as provincial spokesmen has steadily decreased, and the Cabinet has become less and less "a chamber of political compensation."[16] The reasons for these changes can be summarized as follows:

- The time and energies of ministers are increasingly taken up with duties other than those of spokesmen for interests that are specifically provincial or regional. It is generally recognized that ministers are extremely busy people, and the various activities in which they are engaged may conflict in part, at least, with their more limited loyalties to their home provinces or constituencies. A minister is head of a department composed of persons whose activities extend beyond the area from which he comes, and who serve an extra-governmental clientele not territorially delimited.

- The more impersonally rationalized patterns of Cabinet decision making that have been adopted in Ottawa appear to deny ministers some of their former opportunities for promoting interests that are specifically provincial and to weaken Cabinet responses to provincial or regional influences.[47] As well as the inner Cabinet, there were six Cabinet committees in the Clark government, and in the Trudeau government, up to 10 July 1980, there were thirteen standing committees of Cabinet. Inevitably, of course, these committees are less representative than the full Cabinet that stands for the entire range of provincial and regional interests. The Clark government began a practice followed by its successor of making public the composition of Cabinet committees. Apart from talk about the appointment of a minister from British Columbia to the original inner Cabinet established by Prime Minister Clark, there seems to have been no public discussion of provincial representation on Cabinet committees. There has been no outcry, for example, that only four of the thirteen members of the Western Affairs Committee of the Trudeau Cabinet are from that region.
- Ministers have come to play a less important role in party organization than they played in earlier periods of Canada's history. Until the 1960s and 1970s, there was relatively little development of permanent and effective extra-parliamentary organizations, and the party in power expected ministers to take responsibility for party organization and campaign activity in their respective provinces. Liberal ministers appear to have taken little part in these activities during the 1960s until Prime Minister Trudeau imposed on his ministers very specific and detailed responsibilities for party organization in their respective areas after the near-defeat of the Liberal government in the 1972 general election.[48] Important responsibilities for national party activity that were once borne by ministers are now discharged by members of the Senate: in 1978 the last five presidents of the Liberal party had been Senators,[49] and such Senators as Keith Davey, John Godfrey, and Lowell Murray are influential in the parties they represent.[50]
- Ministerial power arising from the exercise of patronage in the ministers' respective provinces and areas appears to have diminished. Under Trudeau governments there has been a senior official in the Prime Minister's Office responsible for giving advice on order-in-council appointments. Under the

Clark government this duty was performed more openly by Mrs. Jean Piggott. While there are no published studies of the matter, there has presumably been considerable centralization of the power to exercise the more desirable forms of personal patronage and a consequent diminution of ministerial authority over such patronage.

- It has been argued that the increasing power of the Prime Minister exercised through his party and through policy apparatus under his direct control has somewhat decreased the power of ministers, and that this change has further decreased their influence as spokesmen for their respective provinces and regions. In Britain, it has been claimed, Cabinet government has been replaced by "prime-ministerial government":[51]

> [The Prime Minister's] right to select his own Cabinet and dismiss them at will; his power to decide the Cabinet's agenda and announce the decisions reached without taking a vote; his control, through the Chief Whigs, over patronage — all this had before 1867 given him near-Presidential powers. Since then his powers have been steadily increased, first by the centralization of the party machine under his personal rule and secondly by the growth of a centralised bureaucracy, so vast it could no longer be managed by a Cabinet behaving like the board of directors of an old-fashioned company.[52]

The prime-ministerial analysis has been applied to Canada,[53] but the argument was made in the context of Pierre Trudeau's early years as Prime Minister, and it is now by no means as clear as it then appeared that the office has been decisively changed in the direction of the Prime Minister's unchallengeable dominance — as long as he retains popular support — of the federal bureaucracy, the party apparatus, and the Cabinet. It is, however, undeniable that the autonomy of the departments of government (and consequently that of the ministers who head such departments) was very much restricted by central agencies in the 1960s and 1970s. It is equally plain that the Prime Minister's Office has become very influential in policy matters with ministerial heads of departments. When these circumstances are combined with the power of the Prime Minister over the party apparatus, Cabinet members have less scope than before in speaking for local, provincial, and regional interests.

In general, then, and contrary to the situation in the nineteenth century, Cabinet ministers have almost ceased to be political figures independent of the Prime Minister and possessing strong bases of support in their particular provinces and regions. Perhaps the last such politician was James L. Gardiner, Minister of Agriculture in the King and St. Laurent governments from 1935 to 1957, who dominated the activities of the Liberal Party and the federal government in the Prairie provinces. Pierre Trudeau said of a similar tradition, "I don't think I could operate in the kind of government system they have in Japan . . . or even Israel . . . where each minister brings his own power base."[54] Although the statement is subject to qualification in details, it is broadly accurate to say that Cabinet ministers have become increasingly dependent, first, on the Prime Minister and his popular standing and secondly on their own individual performances as heads of departments, and that their effectiveness — or lack of it — as spokesmen for regional, provincial, and sub-provincial interests is less and less important in their careers.

The House of Commons

The ability of the House of Commons to respond effectively to the particular needs of different provinces and regions is decisively affected by two circumstances: that under the Westminster model the government has the unshared right to govern, and that to remain in office it must retain the support of a majority of members of the House. The relative cohesion and discipline of legislative parties arises from these circumstances as does the relatively limited influence on the governing process of the members of the Opposition.

Many observers of Canadian politics have come to accept the proposition that the 'first-past-the-post' electoral system greatly encourages and exacerbates tensions among provinces and regions, frustrates the authoritative resolution of the conflicts it causes, and weakens the ability of political parties to co-operate in interprovincial and interregional interests.[55] For example, "From 1921 to 1965 inclusive, the Liberals gained 752 members from Quebec and the Conservatives only 135. The ratio of 5.6 Liberals to each Conservative in the House of Commons contrasts sharply with the 1.9 to 1 ratio of Liberals to Conservatives at the level of voters."[56] Moreover:

> The significance of the electoral system for party policy is due to its consistent failure to reflect with even rough accuracy the distribution of partisan support in the various sections/provinces of the country. By making the Conservatives far more of a British and Ontario-based party, the Liberals far more a French and Quebec

> party, the CCF far more a prairie and BC party, and even Social Credit far more of an Alberta party up until 1953, than the electoral support of those parties 'required', they were deprived of intra-party spokesmen proportionate to their electoral support from the sections where they were relatively weak. The relative, or on occasion total, absence of such spokesmen for particular sectional communities seriously affects the image of the parties as national bodies, deprives the party concerned of articulate proponents of particular sectional interests in the caucus and in the House, and, it can . . . render the members of the parliamentary party personally less sensitive to the interests of the unrepresented sections than they otherwise would be. As a result the general perspectives and policy orientations of a party are likely to be skewed in favour of those interests which, by virtue of strong parliamentary representation, can vigorously assist their claims.[57]

A similar critique of the Canadian electoral system states: "A large measure of the current alienation from federal government comes from the fact that its formal power exceeds its real social power. Governments act, and must act, on behalf of the whole country but they do not have support from a majority of voters, nor do they have caucus representation from large segments of society."[58]

In a recent study the ratio of seats to popular votes in the general elections of 1968, 1972, 1974, and 1979 has been computed. These are the findings for the provinces with the most striking imbalances:

- In Alberta the Liberals did not win a single seat in the last three of these elections, although they received respectively 25.0 per cent, 24.8 per cent, and 20.7 per cent of the popular vote.
- In Quebec the Liberals' ratio of seats to popular votes was 1:41, 1:54, 1:50, and 1:44 in the respective elections of 1968, 1972, 1974, and 1979. The corresponding ratios for the Progressive Conservatives were 0:24, 0:16, 0:19, and 0:20.[59]

On the other hand, it has been argued: "The makeup of the parliamentary party (present and past) undoubtedly affects party policy, but (at least in the two largest parties) only as one of many factors and not the most important of these. It seems more plausible to regard the integration of new members as primarily a function of the outlook and values of the party leadership, a variable whose linkage to the electoral system is so loose (that is, admits of so many intervening variables) that it seems a bit

Draconian to consider the electoral system more than a minor accomplice to possible failures in party integration."[60]

This point is well taken. The legislative parties in the House of Commons are less important than some writers seem to suppose in representing and expressing various interests and in forming party policy, whether a party is acting as the government or the opposition. More important seem to be "the outlook and values of the party leadership." And, for whatever reasons, these leaders seem not to respond in a straightforward way to the evident imperative set by the electoral system of gaining as many seats as possible in the House of Commons. To achieve this end would seem to require that the Progressive Conservatives neglect Quebec even to the extent of cultivating anti-French Canadian sentiments and that the Liberals try to turn the rest of the country against the Prairie provinces. Yet the recent leaders of these parties have not followed such a strategy; in fact the assumption has been made in each instance that the party cannot truly be considered national if it fails to achieve effective representation in the House of Commons by even one of the regions of Canada.

The activity of M.P.'s in promoting interests that are specifically local, provincial, or regional is inhibited by the cohesion of parties in the House of Commons, and, of course, this inhibition operates more strongly when the parties themselves are not representative of particular provinces and regions. Party discipline and party cohesion are essential elements of the underlying rationale of the Westminster model: "Like a court in the British tradition, parliament relies on an adversary technique. Government and opposition sides, with the electorate as jury, put the arguments for and against proposals. The parliamentary system is based on competition not consensus."[61] The House of Commons has its own division of powers with a clear-cut line drawn between ministers who have the collective responsibility for governing and private members, although the position of parliamentary secretaries straddles this distinction. The overriding rule that the government, to retain power, must continue to hold the support of a majority in the House of Commons is a strong incentive for cohesion and discipline among members of the governing party. The pressures for solidarity among members of the Opposition are less intense, although the credibility of the major Opposition party as an alternative government is compromised when it cannot maintain a high degree of unity.

The ability of M.P.'s to promote the interests of their constituencies, provinces, and regions might be increased by their activities in legislative committees if party cohesion were weaker in those committees than in the general proceedings of the House of Commons. From Confederation the Canadian House of Commons had a complex of standing committees broadly parallel to the various departments of government. A major overhaul of the committee system in 1968 reduced the size of the committees and turned over to them the examination of all estimates and most public bills.

In the standing committees the adversary relation among parties is less intense than in proceedings of the House.[62] The party leaders are not ordinarily present; there is less publicity; and time constraints are greatly reduced. Much of the work of committees consists in preparing material to generate final decisions. And, most important, the defeat of a government measure in a committee does not affect the government's tenure. On the other hand, it is almost inevitable that within the general context of the parliamentary system, governments will try, with some success, to control the operations of committees through chairmen and other government members, and that the partisan atmosphere that permeates the House will affect the committees. Moreover not all private M.P.'s become active in committees: "the experience of the period since 1968 has shown that about seventy members do the committee work."[63]

An outsider is not competent to judge the effectiveness of party caucuses in representing and expressing interests that are specifically provincial or regional. As far as the party in power is concerned, "The history of Canadian politics leaves little doubt that the government caucus is of greater utility to the ministry than to the members, and that it is, in effect, the chief instrument of government control of the House of Commons."[64] Under the Trudeau administration, however, the caucus became somewhat more important, and the government committed itself to consult with the caucus in advance on all government measures. (The published record does not indicate whether this commitment was always honoured.) Almost nothing has been written about the role of opposition caucuses. Canada's Official Opposition lacks the highly formal structure of the 'shadow cabinet' that exists in the United Kingdom. However, Joe Clark, as Leader of the Opposition, has taken his caucus in this direction by appointing critics to chair caucus committees in various policy fields. One might hazard a guess that, as opposition caucuses become more of a tradition, they may develop sensitivity to policy concerns that are not territorially bounded and thus become less effective instruments of provincial or local interests.

There seem to be no publications dealing with provincial or regional caucuses, but, lacking published data, it appears that the Liberal caucus from Quebec is the most formally organized and the most influential.

The Senate

Whatever the intentions of the Fathers of Confederation, the Senate has never given effective expression to attitudes and interests that are specifically regional or provincial. Until 1963 "the Senate . . . has rarely been appealed to as the champion of provincial or sectional rights and, even when appealed to, it has not consistently supported claims to such rights . . . In the protection of provincial rights and presentation of provincial views of Parliament, the Opposition in the House of Commons is much more likely to be active precisely because Oppositions get into office by exploiting grievances . . . the influence senators can exert on the Government of the day or on the party leaders in the Commons is very largely personal . . . Individual senators at times do institute enquiries or debates of particular interest to their respective province and region [*sic*]. But the fact is that the Senate as a house carries so little weight with the public that, whatever their intrinsic merit, the public efforts of its members are likely to go unnoticed."[65]

Events since 1963 have done nothing to call these conclusions into question. There are now four ex-premiers in the Senate: Robichaud (New Brunswick), Smith (Nova Scotia), Roblin (Manitoba), and Manning (Alberta). These men are still vigorous, yet no one would reasonably suggest that they have been visible or effective spokesmen for Maritime and Western interests.

In the Clark Cabinet of 1979 and the Trudeau Cabinet of 1980, the incoming Prime Ministers conferred important ministerial portfolios on Senators from Quebec and Western Canada. It may well be that giving such Cabinet representation to provinces and regions that have elected few members to the government side of the House of Commons will become a permanent political practice. This is, in a sense, a reversion to an earlier tradition. Of John A. Macdonald's first Cabinet, four members entered the Senate when it was first constituted, and a fifth was appointed a Senator in 1868. There were only two Senators in Laurier's Cabinet of 1896. In recent times, till 1979, the only Senator to hold important departmental responsibilities in the Cabinet was Wallace McCutcheon, who was Minister of Trade and Commerce in the two months before the downfall of the Diefenbaker government in 1963. In 1969 legislation was enacted to establish a position of 'Leader of the Government in the Senate', and incumbents of this position have been members of the Cabinet.

The Departmental Public Service

Immediately after Confederation most officials in the Dominion civil service were from Ontario and Quebec, and few were from the Maritime provinces. A survey of 9132 departmental officials undertaken in 1965 shows the following:[66]

Geographical Origin	*Percentage*
Atlantic provinces	15.6
Quebec	18.3
Ontario	31.4
Western provinces	26.0
Foreign countries	8.7

('Geographical origin' was here defined as the place where the person enumerated took his or her secondary schooling.)

There is considerable information about the French-English composition of the federal public service. Although such figures must be treated with some caution, there seems to have been a long-term decline in the proportion of francophones in the Canadian public service between Confederation and the end of the Second World War, and this proportion has increased moderately but steadily since 1946. In 1863 there were among the headquarters' staff of 450 some 161 persons who were French, although this group received less than 20.0 per cent of the total pay-roll.[67] The proportion of francophones in the federal public service declined precipitously from 22.0 per cent in 1918 to less than 13.0 per cent in 1946.[68] The Royal Commission on Bilingualism and Biculturalism discovered that in 1964 the mother tongue of some 22.0 per cent of federal public servants was French.[69] According to the 1978 *Report* of the Public Service Commission, the mother tongue of 26.2 per cent of federal public servants was French.[70]

In 1969 the Royal Commission on Bilingualism and Biculturalism published a detailed account of the English-French composition of the federal public service.[71] Some of the more important findings of the Commission may be summarized as follows:

- Although francophones made up 22.0 per cent of the service, in only 2 of 22 larger departments did they make up more than 22.0 per cent of the staff earning $10 000 a year or more.
- Only 11.0 per cent of public servants earning between $10 000 and $14 999 per year were francophones, and only 10.4 per cent of those earning $15 000 or more annually were francophones.
- The median salaries of university graduates whose mother tongue was French were $2077 per year below their counterparts whose mother tongue was English.
- Among professionals only 14.4 per cent were francophones, although the proportion of francophone lawyers (33.5 per cent) and social scientists (22.6 per cent) was higher than that of francophones in the public service as a whole.
- The francophone presence "was relatively strong . . . in senior and high-paying posts filled by appointment through Order-in-Council," and many of these positions were filled by persons 'parachuted' in from outside the public service.

Francophone participation in the various categories of the public service has been summarized in this way:

> Francophones are more strongly represented in the Administrative Support and Operational categories; 66.9 per cent of all Francophones in the Public Service had positions in those categories as opposed to 60.1 per cent of all Anglophones.
>
> 6.8 per cent of all Francophones are in the Technical Category, as compared to 10.3 per cent of all Anglophones.
>
> 6.3 per cent of all Francophones are in the Scientific and Professional Category, as opposed to 9.3 per cent of all Anglophones.
>
> In the Senior Executive Category, the respective proportions are 0.4 per cent of Francophones and 0.6 per cent of Anglophones.[72]

In terms of salaries, 13.6 per cent of those earning $35 000 a year or more and 30.3 per cent of those earning annually between $7000 and $9999 were francophones. The same source asserted that more francophones were needed in the Professional/Scientific and the Senior Executive categories and reported some success in its campaign to recruit more aggressively in the French-language universities, colleges, and CEGEPS.

The thrusts toward institutional bilingualism and the 'balanced participation' of francophones and anglophones in the federal public service embody three reasonably clear sets of claims.

Claim of citizens

The claim asserted here is the citizen's right to communicate with the various departments of the federal government in the official language of his or her choice. In practice, this right will be limited in areas of the country where there is no significant concentration of an official language minority. It must be emphasized that the principle relates to the linguistic capabilities of public servants rather than to their mother tongue. In practice, however, a larger proportion of francophones than of anglophones is bilingual, and the bilingual requirement works in the direction of increasing the proportion of the former in the federal bureaucracy.

Claims of individual public servants

There are two kinds of claims here which, for convenience, will be framed in terms of the francophone.

- At initial recruitment (and after recruitment for as long as this situation persists), the francophone whose English is less than fluent has occupational opportunities as favourable as those of the anglophone who is not completely fluent in French. This includes equal opportunity with the anglophone to improve his knowledge of the other official language during working hours and at public expense.
- Whatever his linguistic capabilities, the francophone public servant has the opportunity to work in an environment where French is the internal language of communication at least some significant part of the time. In part this requirement will be met by environments in which both languages are used, but because a large proportion of francophones, like their anglophone counterparts, will have neither the desire nor the ability to learn the other official language, there is a need for opportunities to work in unilingual French settings.

Claims of the francophone and anglophone communities

There are two somewhat different claims here.

- Because the positions in the higher ranks of the public service command relatively high income and social status, the presence of a significant proportion of francophones is a symbolic recognition that Canadian society accords equality to the French Canadian community.
- Because the public service is an important centre of power, it is necessary that the values and interests of the francophone community be represented and expressed within the bureaucracy by members of that community, particularly those in the higher ranks.

The two kinds of claims outlined above are the major justification for what is called 'representative bureaucracy'.[73] Much of the debate about this principle treats it as opposed to the allegedly neutral principle of merit in the recruitment and placement of public servants. The issue, in Canada at least, is more complicated. The 1918 reforms, as they were implemented in the decades immediately afterward, interpreted 'merit' almost entirely in terms of eliminating partisan/political patronage from the public service. Certainly, until the 1960s, merit did not usually include competence in the French language except in those positions outside Ottawa where there was a large, if not dominant, concentration of French-speaking citizens. Thus the Commission's definition of 'merit' bolstered anglophone dominance in the public service as did the explicit contravention of the merit principle in preferring war veterans.

Representative bureaucracy and the public service

The question then arises: Does 'balanced participation', or 'representative bureaucracy', really affect the achievements of governments in terms of their responsiveness to the values and interests of groups so represented within the public service? The assumption that representative composition of the bureaucracy *does* matter would rest on the premises that the groups that are represented have their own values and interests in relation to the formation and implementation of public policy and that the representatives of these groups in the bureaucracy are willing and able to promote these values and interests. It must be considered, however, that to determine definitely how much balanced participation matters, we would need to know, among other things, the extent of cultural influence inherent in particular governmental positions. In fact the possibilities of furthering the interests of the French Canadian community vary greatly among different positions in Canada's public service. For example, such possibilities are probably fairly limited for an Assistant Deputy Minister of Finance whose responsibilities relate mainly to foreign trade. On the other hand, some of the French Canadian commissioners on the Public Service Commission have defined their role largely as that of defenders of French Canadian interests.[74]

Moreover we know relatively little about the ways in which the values of anglophones and francophones differ and the extent to which these differences shape the conduct of public servants who represent the two linguistic groups. From Lord Durham to the authors of the Tremblay Report, we have impressionistic accounts of the different values of French and English communities, and the accounts do not differ in essentials. Pierre Elliott Trudeau summarized the perceived differences in an article published in 1954 in which he wrote that "against the English, Protestant, democratic, materialistic, business-minded and later industrial environment," our nationalism worked out a defensive system in which all the opposition forces were stressed: the French language, authoritarianism, idealism, the rural life and later the return to the soil.[75]

It is reasonable to believe that the on-going modernization of Quebec is bringing about some convergence in the value systems of the two communities. But the further question remains: What *is* the impact of these different values on the conduct of officials? In a highly speculative way it has been argued that because of their French and Catholic backgrounds francophones "tend to have a more absolutist conception of authority" than anglophones, and that the differences between the two groups are accentuated "when French Canadians work in a French-language setting interacting only with other French Canadians."[76]

It is also reasonable to suppose that francophones in the public service are "minority men in a majority setting"[77] and that this circumstance affects their behaviour. On the other hand, institutions can 'socialize' their members considerably and cause them to adhere to common institutional norms, and this process depends little on the cultural and linguistic background of the persons socialized. One analysis of some of the basic political orientations of M.P.'s and federal bureaucrats has posited that institutional experience is a better predictor of political views than is social background.[78] Similar findings have been made in another survey of the political attitudes of the Canadian élite in government and business: "Differences in social origins have little apparent impact on political ideology. The differences among élite groups are essentially unchanged when statistical controls for social origins are introduced! Furthermore, differences within the capitalist class are only minimally related to social background . . . fully one-third of the top capitalists in our sample come from working class backgrounds, and their political views scarcely differ from the views of their middle class and élite cohorts."[79] In general, then, it may be argued that whatever values are distinctive to French Canadian society do not find effective expression through persons of francophone background occupying élite positions in the federal bureaucracy.

As the recent reports of the Public Service Commission (P.S.C.) make clear, the struggle for balanced French-English participation in the public service is continuous. The following factors are at work:

- Although the P.S.C. does not present figures to support this view, it is commonly believed that the separation rate is higher for francophones than for anglophones. On the other hand, only 19.8 per cent of public servants fifty years of age and over are francophones so that this group can expect to improve its position relative to the anglophone group through deaths and retirements in the latter.
- If current efforts to recruit francophones from French-speaking colleges, universities and CEGEPS continue to be successful, the francophone presence in the Professional/Scientific and Senior Executive categories will increase. In 1978 the 'preferred working language' of 28.8 per cent of the 1051 applicants from the universities was French.
- Recent changes in the linguistic policies of the government may be expected to work against francophones. The purpose of one of these policies is to reduce the number of bilingual positions by relating the need for bilingual competence more closely to the functional requirements of the position. This will obviously reduce the number of opportunities for bilingual francophones. In addition the government's acceptance of the 'youth option', which by 1982 required prior knowledge of both languages for bilingual positions, must obviously displace a significant number of francophone teachers of French to public servants.

In general, representative bureaucracy does not appear to determine how public policies are formed and implemented or the degree of governmental responsiveness to particular values and interests of groups that are represented in this way. Thus measures to increase the proportion of francophones in the federal public service must be justified on other terms.

- First, they extend the ability of the government to deal with French-speaking citizens in their own language.
- Secondly they counter Quebec nationalism by creating employment opportunities for a significant number of francophones, especially, of course, for highly educated and talented francophones.
- Thirdly they symbolize the wider Canadian community's respect for francophones.

On the other hand, the conduct of bureaucrats is more decisively determined by institutionally defined roles and institutional imperatives than by the linguistic backgrounds or immediate cultural allegiances of those who occupy official positions. In order to survive, organizations must successfully 'socialize' their members to play organizational roles; as a general rule it follows that members who hold the more influential positions will be more completely 'socialized' than less powerful members. Moreover many, if not most, bureaucratic positions afford few opportunities for advancing the interests of particular cultural groups. It is notable that a greater proportion of francophones than of anglophones is appointed from outside the public service to senior or intermediate positions in the federal bureaucracy, and those who hold such positions may maintain their cultural allegiances more resolutely than do officials promoted 'from the ranks'. However, the general conclusion still stands that the increasing proportion of francophones in the executive and professional categories of the federal bureaucracy from the mid-1960s onward has made its policy little more responsive to the particular values and interests of French-speaking Canada.

The Federal Regulatory Agencies

Such federal regulatory agencies as the National Energy Board, the Canadian Radio-television and Telecommunications Commission, and the Canadian Transport Commission increasingly influence Canadian economic life and federal-provincial relations. These 'independent' regulatory agencies have legislative, administrative, and adjudicative powers, and are thus 'miniature governments'. They have been established outside the normal departmental framework of the public service to encourage flexibility, to permit them to acquire expertise less freely available to departments, and to separate their adjudicatory functions from the play of partisan politics. Yet these agencies' independence of ministers and the Cabinet has inhibited some necessary federal-provincial bargaining.[80] This situation might be set right by strengthening ministerial and Cabinet control over the legislative and administrative activities of the agencies while retaining and even extending their independence in areas of adjudication.[81]

In a recent study of 134 members of twelve federal regulatory agencies, the background of these regulators was examined in terms of their birthplace and work place at their time of appointment. In relation to birthplace, the findings were that "as compared to the distribution of population, Manitoba, Quebec, New Brunswick, and Nova Scotia are slightly over-represented . . . Quebec has a representative on each of the agencies, with the exception of the Foreign Investment Review Agency."[82] In relation to work place at the time of appointment, forty persons, that is just about 30.0 per cent of the regulators, lived in the Ottawa-Hull area, 17.9 per cent in Ontario outside Ottawa, 23.9 per cent in Quebec outside Hull, 9.6 per cent in the Atlantic provinces, and 18.7 per cent in the Western provinces.

Thirty-eight of the 134 regulators were francophones, although their proportion to anglophone personnel varied greatly among the agencies. One third of the regulators were francophones in five of the agencies; of these two had francophone presidents. The latter circumstance led to the speculation that "the president has some role, if not in recommending the names of specific individuals, at least for establishing certain criteria for the selection of members."[83]

In general, then, Canadian governments pay some attention to cultural and regional representation in making appointments to regulatory agencies. Only detailed study of each agency could determine how much its regulators are influenced by their cultural and regional backgrounds, and how far each agency represents and speaks for the interests and activities of particular provinces.

The Political Parties

Students of contemporary democratic politics are usually disposed to emphasize the role of political parties in embodying and expressing the public's values and interests and in converting these values and interests into public policy. On the other hand, a good deal has been written about the declining effectiveness of parties. Concerning Canada, for example: "By deciding which partisan team forms the government and who is in opposition, parties do organize government in an important way. But there is little doubt that a great many decisions about what is placed on the political agenda and at what time, are forced on political parties by events, non-political decision-makers and very often the preferences of powerful civil servants, whose responsibility to the politicians is increasingly more formal than real."[84] And again, "an important shift has occurred in the locus of power of liberal democracies, from elected politicians to appointed civil servants, whose links to political parties are indirect and increasingly tenuous. This means that parties, supposedly in control of the political process and responsible to the public for its performance, are often little more than impotent observers of processes they cannot control and the results of which they can only rubber stamp."[85]

Persuasive, if not conclusive, evidence has been offered that the policies of different parties do not differ significantly even when those parties have different ideologies and policy commitments and are supported by different groups within the electorate.[86] Political parties *do* play crucial roles in the political system in deciding which team is to form the government, in recruiting candidates for elective office, and in electing those candidates. Yet the extra-parliamentary organizations of the parties play a relatively limited role in the policy-making process.

The history of party organization in Canada has yet to be written, but the situation as it existed prior to 1950 involved the following basic elements in the two major parties.

- There was a relatively high degree of financial centralization in that the bagmen of the national parties collected funds from the head offices of major corporations in Montreal and Toronto.
- The indispensable instruments for party activity in federal election campaigns were the provincial party organizations which, when the party was in power in Ottawa, worked in

co-operation with the Cabinet ministers who represented their provinces.

- The constituency party organizations had a high degree of autonomy in the selection of candidates for election to the House of Commons, although this privilege operated to a lesser degree in Quebec than elsewhere in Canada.

In the 1960s and 1970s the federal and provincial wings of the political parties have gradually grown farther apart.[87] The 'confederalization' of the Canadian party system has been most marked among the Liberals and somewhat less so among the Progressive Conservatives; the New Democratic Party (NDP) is relatively integrated on federal-provincial matters. This separation of the federal and provincial wings of the other parties is much less pronounced in the Atlantic provinces than elsewhere in Canada. In summary:

- Although federal-provincial voting behaviour is very complicated, federal and provincial wings rely on significantly different bases of voter support in particular provinces. Thus a party that hopes for electoral success at one level must usually attract voters who cast their ballots for other parties or abstain from voting at the other level.
- The federal and provincial wings of the parties are separate in extra-parliamentary organization. The national party organization is an instrument of the national party leader and is geared almost entirely to electoral success in national elections.
- Increasingly there are discrete federal and provincial career patterns in elective politics. The most important contributing factor is that elected participants in federal-provincial relations are ministers with neither experience nor ambitions centred on the other level.
- Increasingly federal and provincial wings of the parties are financially independent of each other. A strong influence for such independence is federal and provincial legislation that regulates the financial affairs of parties and sometimes provides public subsidies for those that are recognized.
- In the Liberal and Conservative parties federal and provincial ideologies are not clearly distinguishable from each other. Provincial parties take on the ideological colorations that reflect the preferences of their members and their own electoral advantage.

- The party system is highly asymmetrical in the sense that the major contenders at one level do not always hold the same position at the other. For example, in Quebec and British Columbia, the provincial government parties have no federal links; the Liberals are in power in Ottawa, but in none of the provinces. The NDP is in power in one province and forms the Official Opposition in two others, but it is relatively weak in federal politics. This asymmetry both reflects and reinforces the independence of the federal and provincial wings of the parties.

Something needs to be said about the national party convention,[88] the institution that chooses federal party leaders and that, as the Progressive Conservative convention of 1967 demonstrated, has the power to depose the leaders it has previously chosen. Of all our major political institutions, the national party convention is the least federal. Roughly sixty per cent of the delegates to the Liberal and Conservative conventions represent constituency organizations. Although serious candidates have bases of regional support, they must seek votes on the successive ballots of delegates outside these regions. Provincial party leaders are usually not the most influential political actors at national conventions.

The national party convention is a critical event in determining the relation between the party leader and his caucus in Parliament. The leader has relatively little influence on the nominating process in the constituencies and thus on the composition of his party in the House of Commons. Similarly M.P.'s and Senators constitute a relatively small proportion of the membership of the leadership conventions. Thus the leader is not the choice of his caucus and may be deposed, even though the majority of his caucus supports him. Moreover, as the careers of Trudeau, Stanfield, and Clark demonstrate, a person who wishes to be elected leader of his party need not have a lengthy record of parliamentary service.

Intrastate Reforms

Changes in the Electoral System

The recommendations of the Pepin-Robarts report and of the Beige Paper[89] have put electoral reform on the agenda of constitutional change. This new concern has certainly been strengthened by the results of the 1979 and 1980 federal elections, in which the Liberals and Progressive Conservatives demonstrated their respective lack of effective electoral support in the Western provinces and Quebec. Four major plans for electoral reform have been proposed:

- In 1978 Donald Smiley proposed that "Voters . . . cast their ballots as they now do and the same number of M.P.'s . . . be elected from single-member districts. But the House of Commons would be enlarged to include one hundred 'provincial' M.P.'s, with Prince Edward Island having one of these and the rest distributed among the other provinces in proportion to their respective populations. . . The provincial M.P.'s would be chosen by ranking in each province those candidates who had received the highest proportion of popular votes to the winning candidates."[90]
- The scheme suggested by Edward Broadbent in 1978 was the enlargement of the House of Commons by 100 seats, of which twenty would be allocated to each of Canada's regions. The regional seats would be apportioned among the parties according to their proportion of the regional popular vote and filled by the parties according to the regional list method.
- The proposal made by William Irvine in 1979 was to increase membership in the House of Commons from 282 to 354 persons while reducing the number of M.P.'s elected from single-member constituencies to 188. The 166 provincial seats created by these changes would be filled as follows:

  > . . . political parties choosing to elect provincial representatives would have to provide the chief electoral officer with eleven lists, one for each jurisdiction in the table, each with a number of names equal to the number of provincial representatives and listed in rank order. On election night, votes would be tabulated in each constituency and the candidate with the highest total would be declared elected from that constituency. So far, there has been no change from current practice. However, the votes for candidates of each recognized party which had submitted provincial lists would be aggregated to the provincial level, and the percentage distribution of the provincial vote so aggregated would be calculated. The total number of provincial seats (constituency plus provincial representatives) would be multiplied by each party's percentage of the provincial vote, yielding each party's provincial entitlement. If the number of constituencies won exceeds the entitlement for any party, no action is taken. All constituencies are represented by their most popular candidate. Where the number of constituency victories is less than the entitlement, sufficient candidates from the

> party's provincial list are declared elected to make up the entitlement, beginning at the top of the list and skipping over any person already elected from a constituency.[91]

- The proposal made in 1980 by Ronald G. Landes recommends the addition of 100 'national seats' to the House of Commons.[92] The national seats would be apportioned on the basis of the parties' national votes, with the proviso that a party would need to win at least 1.5 per cent of the national vote before it became eligible for a share of the national seats. The parties would appoint such national M.P.'s *after* each general election, and there would be no provincial or regional constraints on their choices. No person could serve more than two terms as a national member.

All these proposals recommend 'topping up' the existing system of election from single-member constituencies. Although each of these schemes would result in a closer coincidence between the proportion of the national popular vote received by the parties and the proportion of seats occupied by those parties in the House of Commons, the objective of each scheme is to correct the regional/provincial imbalances caused by the present electoral system.

Several points may be added concerning the reform of the electoral system. First, judgements about changes will largely be determined by the degree of desirability attributed to the system of majority government. The record of the present system in producing legislative majorities is not impressive. Of the eighteen federal general elections between 1921 and 1979, only ten have produced majority governments, and six minority governments have been elected since 1957. Moreover it is reasonable to believe that the further reforms take us from the existing electoral system, the more likely and even inevitable does minority government become. For example: "A long-run possibility is that major party strength would settle down in the 25% range, the more popular one being somewhat higher in any election, the other somewhat lower. At this level, two-party coalition governments would appear quite viable, though a major party might also choose to govern with a larger number of smaller regional parties."[93] Both scholars of Canadian politics and the general public now appear to hold a more optimistic view of the possible advantages of minority government than they held in the past. With the exception of the government formed after the 1917 election on the conscription issue, there has never been a coalition in power in Ottawa. If coalition became the normal pattern of Canadian government, it is obvious that both the parliamentary system and the parties themselves would operate in ways very different from their present practices.

Secondly the kinds of reform that have been proposed — except, perhaps, that of Landes — would encourage more vigorous inter-party competition in those parts of Canada where one party is overwhelmingly dominant, particularly in Quebec and Alberta. It appears not entirely coincidental that these are the provinces imposing the most severe strains on Confederation, as well as the provinces where one-party dominance in federal politics is strongest. It is reasonable to suppose that more vigorous party competition would make parties and candidates in such provinces more responsive than they now are to provincial/regional attitudes and interests.

Thirdly the proportional representation schemes proposed by Irvine, Broadbent, and Landes would strengthen the federal and/or provincial parties at the expense of local party associations. The procedure by which parliamentary candidates are nominated is now relatively decentralized, though perhaps less so in Quebec than elsewhere in Canada. Proportional representation requires that the candidates who are nominated be chosen by the parties themselves. The current Canadian proposals for modification of the existing system appear to confer this power to choose candidates on the extra-parliamentary parties, whose position would thereby be enormously strengthened, not only in relation to their local associations, but also in relation to the parliamentary parties.

Fourthly proposals for reform have been criticized on the ground that they would create invidious distinctions between M.P.'s elected from single-member districts and those chosen by other procedures. Landes' scheme is particularly vulnerable to this objection as his 'national' M.P.'s would be appointees of their parties rather than persons chosen by popular election. Smiley's proposal is also vulnerable since provincial members would be 'runners-up' in their respective ridings, although they would have established themselves as serious political competitors in single-member ridings. It is impossible to judge how M.P.'s themselves and members of the public would regard the two groups of legislators, but certainly the advantages claimed for current proposals would be very much reduced if the legitimacy of one category of members were called into question.

Of all the proposals for intrastate federalism, those supporting electoral reform appear most consequential to the working of the Canadian political system; certainly they are far more so than recommendations relating to the Supreme Court of Canada and probably more so than those suggesting a new kind of second chamber of the federal Parliament. Irvine goes to the heart of the matter: "A large measure of the current alienation from federal government comes from the fact that its formal power exceeds its real social power. Governments act, and must act, on behalf of the whole country, but they do not have support from a majority of the voters, nor do they have caucus representation from large segments of the society."[94] Again, a spirited critique of the Pepin-Robarts report gave foremost importance to arresting the disintegration of the national party system by establishing some sort of partial proportional representation in electing members to the House of Commons.[95] The authors argued that in dealing with our current problems, Pepin-Robarts and others have been too ready to "reach for the constitutional lever." Most of the reforms proposed are probably impossible to execute, and many of them are undesirable. The general conclusion favours a continuing reliance on executive federalism and changes in the federal electoral system.

Yet not too much should be expected of electoral reforms.[96] Such reforms are likely to make government parties in the House of Commons more fully representative of all the regions and major provinces and to increase competition between the two major parties in those parts of Canada that one or other of them now dominates. Since, however, the Conservatives have lost most of their base in Quebec and the Liberals in the Western provinces, particularly in Alberta, reforms in the electoral system alone will probably not overcome their deficiencies. Political parties in Canada, as in other Western democracies, have lost much of their former capability of representing and expressing public attitudes and interests. It has been argued that the federal Liberal party is no longer able to fulfil its former function of nation building and nation maintaining by facilitating power sharing between English and French and by establishing the national economic policies of the Montreal business magnates.[97] Thus reforms in the electoral system alone are unlikely to restore the position of the national parties in the Canadian political system.

Changes in the Operations of the House of Commons

A plausible case can be made that the House of Commons cannot adequately represent regional, provincial, and local interests because of the degree of discipline and cohesion in the political parties in the Legislature. Territorially based interests, it can be argued, cannot be effectively represented by M.P.'s who, in making crucial decisions relating to the activities of the House, put their parties first. As the law-making function is almost entirely monopolized by the Cabinet and the appointed bureaucracy, this discipline is strongest in the government party.

The *Report* of the Special Joint Committee of the Senate and House of Commons on the Constitution, published in 1972, made this recommendation:

> Every House of Commons should continue for four years, from the day of the return of the writs for choosing the House and no longer, provided that, and notwithstanding any Royal Prerogative, the Governor General should have the power to dissolve Parliament during that period:
>
> (1) when the Government is defeated
>
>   (a) on a motion expressing no confidence in the Government; or
>
>   (b) on a vote on a specific bill or portion of a bill which the Government has previously declared should be construed as a motion of want of confidence; or
>
> (2) when the House of Commons passes a resolution requesting dissolution of Parliament.[98]

The effect of this measure would be to remove from the Prime Minister the unilateral power of recommending dissolution, a power which, under some circumstances at least, increases his control over his own party and over the House of Commons.

Other recommendations would strengthen the committee system of the House of Commons. Their major objective is to encourage cross-party activity in committees so that individual M.P.'s could express more freely and effectively the interests and attitudes specific to their particular localities and provinces. The reforms most commonly suggested are those of providing the chairmen of committees with extra allowances and staff services and of equipping the committees with the means for significant research.

There are, however, fairly narrow, though somewhat imprecise, practical limits on strengthening the committees and increasing the freedom of individual M.P.'s to give expression in committees to provincial and constituency interests. First, it is difficult to provide incentives for members to participate actively in committees. It has been estimated that about seventy M.P.'s, that is, about one third of the private members, do the committee work of the House of Commons.[99] Committee activities are not highly publicized, and active participants in committee work appear to receive few rewards; these are limited either to an increase of the M.P.'s strength in his own riding or to his preferment at the discretion of his party leader.

Secondly the House of Commons operates on the adversary principle, and the adversaries are the organized political parties. Their internal cohesion and discipline are characteristic of legislative assemblies working within the Westminster framework,[100] where "the House of Commons has a constitutional function; not to govern, but *to support a government*."[101] The executive has almost completely monopolized the legislative function. As long as these circumstances exist, the conflict among parties, which dominates the House of Commons, can be expected to affect its committees powerfully and to provide the party leaders, especially the Prime Minister and his Cabinet colleagues, with incentives to control committee activities. The Canadian Parliament, in short, is not Congress, and its committees cannot be expected to act with the absence of party discipline characteristic of American Legislatures.

A New Second Chamber

Apart from the scheme put forward by the Government of Alberta, all proposals for comprehensive constitutional reform made since 1976 provide for the replacement of the existing Senate by a new second chamber designed to give more effective representation to Canada's provinces. In fact this kind of change is the centre-piece of recommendations that tend toward intrastate federalism.

The reform suggested by the Trudeau government in Bill C–60 for a House of the Federation received little support at the time it was made and has not been given much attention in subsequent constitutional discussion. Bill C–60 proposed that half the members of the second house be appointed by party leaders in the House of Commons, and half by party leaders of the provincial Legislatures in proportion to the share of the popular vote that their respective parties had secured in the preceding federal or provincial election. The powers of the new second chamber would be limited to a sixty-day suspensive veto over measures enacted by the House of Commons, except for special responsibilities relating to legislation of 'specific linguistic significance' and its power to ratify certain federal appointments. There were also somewhat sweeping provisions by which the House of Commons might by-pass the House of the Federation entirely in enacting legislation. In general, if such a House of the Federation were established, it would be an ineffectual body composed of members appointed by patronage, whose duties would be relatively light and who would, presumably, receive generous emoluments. The federal scheme contained no clues as to whom — if to anyone — members of the new second chamber would be responsible.

Several of the recent proposals for constitutional reform include the replacement of the Senate by a 'House of the Provinces' or, in the Beige Paper plan, a 'Federal Council' composed of delegates chosen by members; but "the federal government should have the right to delegate its own representatives to the Council to put forward its views."[102]

The major responsibility of the Federal Council would be the ratification, presumably by majority vote, of "all central government proposals affecting the fundamental equilibrium of the federation."[103] These include (1) the exercise of the federal spending and emergency powers; (2) the appointment of justices, including the Chief Justice, of the Supreme Court of Canada, and the power to revoke those appointments; (3) the appointment of the presidents and chief executive officers of such major federal agencies as "the Bank of Canada, the National Energy Board and of Crown corporations such as Canadian National Railways and Air Canada"; (4) "matters where federal jurisdiction cannot be exercised or is void without the approval of the provinces," including, for example, international treaties involving matters within provincial legislative jurisdiction and schemes for the interprovincial or international marketing of agricultural products; (5) proposals for the delegation of legislative powers between the federal and provincial governments as follows:

- The Council would have the authority to advise the federal government on a wide range of matters where the latter's power is safeguarded, but where provincial interests are involved. This includes such areas of federal jurisdiction as fiscal and monetary policies, energy, transportation, and

various policies relating to interprovincial and interregional equalization.
- The Council would have a permanent committee whose duties would relate to federal action in linguistic and cultural matters. The Council would ratify "federal proposals in linguistic matters" and the appointment of presidents and chief executive officers of such agencies as the Official Languages Commission and the Canadian Broadcasting Corporation. It would also advise the federal government in other cultural matters and "ensure that the Civil Service reflects Canada's dualism at all levels."[104] The 'dualist committee' would have an equal number of English-speaking and French-speaking members; it has been suggested that eighty per cent of the latter group might be from Quebec. Although the document is not explicit on the point, it appears that, contrary to the practice in other activities of the Council, members of the dualist committee would be expected to vote as individuals rather than as provincial delegates who would vote *en bloc* under the instructions of the governments that appointed them.
- A permanent joint committee of the House of Commons and the Council would be established to decide whether the Council should exercise its function of ratification, advice, or representation of cultural duality in particular matters.

The establishment of a Federal Council as proposed by the Beige Paper would result in a tripartite, rather than the present bipartite, division of the powers of government. There would be (1) powers that could be exercised by the House of Commons and/or the federal Cabinet acting unilaterally, (2) powers that could be exercised by the provincial Legislatures and/or Cabinets acting unilaterally, and (3) powers that could be exercised by the House of Commons and/or the federal Cabinet only with the ratification and consent of the provincial governments acting through the new second chamber. In the Beige Paper scheme the division between categories (1) and (3) appears to be clear and unequivocal. However, experience in the Canadian and other federations should alert us to the likelihood that conflicts of jurisdiction are likely to arise here, as well as between categories (1) and (2). The Beige Paper suggests somewhat loosely that "a joint committee of the Federal Council and the House of Commons should be empowered to make . . . decisions on the constitutional jurisdiction of each institution." There is no recommendation concerning what is to happen in the event of a deadlock between the Federal Council and the House of Commons and/or the government; in such circumstances it is to be expected that the delineation of jurisdiction would be made by the courts.

The proposed Federal Council would institutionalize the processes of what has come to be known as 'executive federalism' and give these processes a constitutional status. The projected reform would go a very long distance toward eliminating one of the major defects of the existing system in the provinces and between the provinces and the federal authorities. Under the present régime such conflicts result in deadlock in some circumstances and in others are resolved through unilateral action.

The Federal Council might be expected to develop as follows:

- It seems unlikely that the Council would develop much of a sense of corporate identity since its membership would probably not be stable. While the situation might vary with different provinces, it appears likely that the personnel of provincial delegations would change often as different kinds of matters appeared on the Council's agenda.
- It is uncertain whether the Council would lead to more intense federal-provincial conflicts than now exist or would reduce such conflicts. It has been suggested[105] that such a body would not only lead to a greater federal sensitivity to provincial interests, but also, because of the permanent provincial presence in Ottawa, to an increasing sensitivity on the part of the provinces to the interests and problems of the central government. But this is, of course, conjecture.
- It is not clear how the Council would handle the ratification of executive and judicial appointments, or what effect this procedure would have on the quality of persons so chosen. Perhaps, in this area, the provinces, acting through the Council, would be relatively permissive. The federal and provincial authorities might engage in a significant amount of consultation before the names of prospective choices were brought before the Council. Perhaps the Council would give the federal government a relatively free hand in making certain categories of appointments and scrutinize others more closely, but it is not certain what kinds of criteria the provinces would use to measure different categories of appointments. It is also uncertain whether the council would choose to make appointments mainly through public hearings in the fashion of the United States Senate or in less public ways.

The Beige Paper and other similar schemes are highly asymmetrical in that they give the provincial governments a number of devices for influencing the exercise of federal powers in circumstances where provincial interests are alleged to be affected, but confer on Ottawa no corresponding powers to influence the provinces when these challenge important federal interests. Yet Canadian nationhood in the economic sense involves the ability of the federal authorities:

- To sustain and defend the Canadian common market in respect to labour, capital, and commodities
- To effect interpersonal and interprovincial equalization in public services and employment opportunities
- To pursue economic stabilization through fiscal and monetary policies
- To act as the sole Canadian agent in international economic affairs
- To guarantee energy supplies and exercise a significant influence on domestic energy prices
- To exercise an important, if not decisive, influence in shaping the structure of the national economy.[106]

The ability of the central government to discharge these necessary functions is restricted under the existing system of Canadian federalism. Its limited capability would be further restricted by implementing the provisions of the Beige Paper and other recent proposals for allowing a reconstituted second chamber to limit federal powers, as well as by adopting recommendations that the provinces' legislative powers in economic matters be extended.

Federal Regulatory and Executive Agencies

Most of the proposals for comprehensive constitutional reform recommend that the new second chamber be involved in ratifying the appointment of members of certain federal regulatory and other executive agencies. Alone of these proposals, the 1978 scheme of the Alberta government does not recommend as desirable a House of the Provinces/Federal Council, but suggests that forty per cent of the members of such federal agencies as the Canadian Transport Commission (CTC), the National Energy Board (NEB), the Canadian Radio-television and Telecommunications Commission (CRTC), and the Canadian Wheat Board (CWB) be appointed by the provinces according to a system worked out by the Conference of Premiers. As we have seen, the Beige Paper's Federal Council would ratify the appointment of "the Chief Executive Officers of major central government bodies such as the Bank of Canada, the National Energy Board and of Crown corporations such as Canadian National Railways and Air Canada," and the dualist committee of Council would ratify the appointments of the presidents and chief executive officers of such cultural agencies as the Official Languages Commission (OLC) and the Canadian Broadcasting Corporation (CBC).

Other recommendations have been made in the direction of further sensitizing federal regulatory agencies to provincial policies and interests: "provincial governments should participate in the process of selecting members of federal regulatory agencies, particularly chairmen and vice-chairmen."[107] However, a basic criticism of the existing system is that such agencies as the CRTC, the NEB, and the CTC exercise policy and legislative functions outside the political control of the federal Cabinet or individual federal ministers. Thus the normal processes of federal-provincial adjustment that operate when departmental agencies of the central government are involved are precluded by the independence of the regulatory agencies. Some basic proposals for remedying such deficiencies are these:

> All regulations of federal regulatory agencies should require either ministerial or Governor in Council approval before taking effect.
>
> All statutes creating federal regulatory agencies should contain a provision empowering the Governor in Council to issue, subject to statutory safeguards, policy directives to the agencies.
>
> Rules of procedure of all Federal regulatory agencies should require Governor in Council or ministerial approval.[108]

If these recommendations for ensuring political controls over regulatory agencies were adopted, appeals of agency decisions to ministers and the Governor in Council should be abolished, for the agencies would be under effective political control as far as policy matters are concerned. Thus the independence of such agencies in respect to purely adjudicatory functions would be strengthened.

A further set of recommendations would, if implemented, strengthen provincial influence over federal regulatory agencies.[109] In all statutory instruments guiding such agencies, there should be specific directives to take provincial policies into account. To remedy a persistent provincial complaint, agencies should not be allowed to disclose information coming into their hands. Provincial governments should be granted standing by statute to participate in agency hearings and should also participate in selecting agency members.

One can only guess the likely impact of provincial participation in choosing the members of federal regulatory agencies if the agencies continued to have the same powers and independence of political control they now enjoy. It appears likely, however, that if provincial powers included ratification of such appointments, the federal authorities would cease to appoint to such positions persons who had visible ties with the party in power; in fact, because the appointment and ratification process would involve governments of several partisan complexions, prior partisan allegiance would likely be a positive disadvantage to any prospective appointee whatever other qualifications and qualities that person had. Beyond that, the impact of this process on the nature of appointments and on the sensitivity of agencies to provincial interests is a matter of conjecture. The major reforms that have been suggested would likely change the operations of agencies in a more determinate way and increase provincial influence on those agencies. A persuasive case has been made for strengthening the political control of the federal Cabinet and individual federal ministers over the policy functions of regulatory agencies, but the rationale for proposals to increase provincial authority over such agencies is questionable. This rationale would deny that agencies acting with federal legislative jurisdiction could or should represent and speak for national interests independently of the provincial governments. An alternative norm for federalism is that both the orders of government should perform the responsibilities assigned to them by the Constitution and be held accountable for those responsibilities, independent of controls by each other.[110] The implication is that provincial governments should have no more standing than private interest groups in respect to regulatory or other functions within federal legislative jurisdiction. I find this norm more compelling.

Intrastate Federalism: A Critical Appraisal

As we have seen, the current debate on constitutional reform has developed from an almost exclusive concern with the division of legislative powers to include a number of proposals tending to make the institutions of the central government more representative of and more responsive to provincial, regional, and cultural differences. To take an important example, the creation of the Federal Council is the centre-piece of the Beige Paper, and spokesmen for the Quebec Liberals have affirmed that if this part of their scheme were not adopted, all the other proposals would have to be reconsidered. Similarly the new interest of the Government of British Columbia in constitutional reform has been characterized by an insistence on changes in the direcion of 'power at the centre', and it is reported that that province's agreement to other changes is conditional on federal agreement to its demands relating to intrastate federalism. British Columbia's Deputy Minister of Constitutional Affairs declared on 21 October 1980:

> Is it any wonder that feelings of alienation exist in British Columbia when the largest and second largest provinces of Canada each have twenty-four members in the Senate of Canada whereas British Columbia, the third largest province, has only six? The Senate, you will recall, was to be the regional voice in the federal law-making process.
>
> Is it any wonder that feelings of alienation exist in British Columbia when the Supreme Court of Canada has at all times three members from Quebec and, until recently, three members from Ontario with one appointment from British Columbia on an average about every thirty-five years?
>
> Is it any wonder that there are feelings of alienation when, of the nineteen major federal boards and commissions of this country, no British Columbian is represented on twelve of them?
>
> Even the House of Commons, whose representation is based on population, lags about ten years behind current population figures which means, in a fast-growing province like British Columbia, this represents serious under-representation. These institutional deficiencies exist whoever is in power in Ottawa.[111]

In one analysis of these new directions of proposed constitutional reform, a useful distinction has been drawn between 'provincialist' and 'centralist' intrastate federalism.[112] Although most of the specific proposals for change, supported by those writing from both these perspectives, coincide, provincialist and centralist views proceed from different evaluations of what the federal system is and should be.

Provincialist intrastate federalism is a straightforward attempt to strengthen the power of the provinces, especially the power of the provincial governments, by conferring on them the means to control a range of matters that have so far been within the exclusive powers of the federal Cabinet and the House of Commons. The report made under the direction of the Canada West Foundation stated, "We . . . have the most centralized structure of national government among the world's free federations with the prime minister appointing the governor-general, lieutenant-governors, the cabinet, members of the sen-ate, and the Supreme Court; in fact the entire structure of the central government with the exception of the House of Commons."[113] The assumption of provincialist intrastate federalism is that the most serious political divisions with which Canadians must deal are those of cultural duality and regionalism, and that the provincial boundaries appropriately express these differences. Put negatively, the existing institutions of the federal government are incapable of representing and speaking for territorially bounded interests.[114]

Centralist intrastate federalism is directed towards strengthening the powers of the central government by making that government more representative of cultural and regional interests, for "Canada cannot effectively be governed unless Ottawa is the focus of significant popular identifications and the political arena in which the interests of powerful groups are resolved. Yet territorialism is the dominant circumstance of our political life. The institutional imperative then is to so modify our political structures as to secure the more effective channeling of territorially demarcated attitudes and interests through the central government rather than the provinces alone."[115]

The two broad options, then, are "either a wholesale decentralization of power in favour of regional and provincial autonomy, or fundamental reform of federal institutions to make them more responsive to regional concerns and interests in the evolution of national policy."[116] The possibility must be faced "that any simple formula for the decentralization of power risks further fragmentation of the country and would leave the economically weaker parts even more vulnerable than they are today."[117]

Centralist intrastate federalism states the following related propositions:

- The federal government is weak in its ability to evoke strong popular identifications and to bring about a decisive resolution of powerful conflicting interests within Canada.
- Ottawa's weakness and the strength and assertiveness of the provinces are largely attributable to the failure of the in-

stitutions of the central government to be effective representatives and spokesmen for territorially bounded interests.

- The central government would be significantly strengthened and the increasing provincialization of the political system could be contained by making federal institutions more effectively representative of particular cultural and provincial interests.

I would argue that all three of these propositions are somewhat questionable. It may be, in the first place, that central government weakness and declining legitimacy have been somewhat exaggerated. Ottawa has powerful vested interests attached to its cause within the federal political élite itself. In English-speaking Canada a strong current of popular support upholds a powerful central government. The Atlantic provinces fear the emasculation of Ottawa. And in several instances in the Trudeau era, Ottawa *did* act decisively: in the FLQ crisis, in challenging the provinces on such matters as energy pricing and cablevision, in its prices and incomes policy of 1975, to cite a few examples.

> Like the first proposition, the second is debatable: Contemporary provincial government power is more than a byproduct of Ottawa's insensitivity. It is based on their jurisdictional possession of the growth areas of government, the increasingly competent bureaucracies at their disposal, the extensive funds over the disbursement of which they preside, the ambitions of their political and bureaucratic élites to maintain and expand the provincial empires under their control, and generally by their extensive capacity to reward and punish the interests and forces their policies encounter. . . As long as the provincial governments do not have their jurisdiction or resources diminished by explicit change in the BNA Act, their capacity to reward and punish, coerce and direct will not readily fade away.[118]

If this evaluation is broadly accurate, as I believe it is, the power and assertiveness of the provinces will not be appreciably lessened by intrastate reforms. It is, however, possible that the legitimacy of the federal government might be strengthened by changes in the electoral system that would make it more fully representative of the provinces and regions. Yet the supporters of intrastate federalism who maintain that the governmental apparatus in Ottawa has become increasingly unresponsive to cultural, regional, and other territorially bounded interests are also correct. Apart from the imbalances in the House of

Commons, which to a significant degree have been brought about by the electoral system, the following factors appear to have contributed to this insensitivity.

- The federal Liberal Party has lost much of its former ability to link diverse cultural and regional interests. It has been argued that, of all the public institutions of Canada, only the federal Liberal Party has facilitated the sharing of power between French and English. But the party has largely ceased to play this mediatory role: the Québécois political élite is divided, and the English financial community of Montreal has lost its former ability "to bring together the diverse and competing demands of Canadian society and to formulate some national purpose to which all could subscribe."[119]
- Cabinet ministers have lost much of their ability to represent and express the interests specific to the provinces and regions where they were elected. From Confederation to about 1940, the Cabinet was an important representative body, but to a marked degree this has ceased to be so.
- The federal executive's new methods of decision making keep the Cabinet and appointed bureaucracy from dealing effectively with territorially based attitudes and interests. These administrative processes decrease the sensitivity of the political system to pressures from provincial, regional, and other interests. In these aspects of governmental representation, there are several organizational imperatives: the objectives of public policy should be formulated in highly general terms; more specific aims should be controlled by broader goals; and the efficiency and effectiveness of on-going or projected programs should be evaluated as precisely as possible.

In general almost all proposals for intrastate federalism focus on changes in what one might justifiably call 'the peripheral institutions of the central government': the Supreme Court of Canada and a House of the Provinces or Federal Council. It seems unlikely that such changes would strengthen the authority of the federal government or restrain the provinces. Reforms in the federal electoral system might contribute to these objectives of centralist intrastate federalism. Yet even if electoral reforms were made, any set of proposals that does not directly change the operations of the political parties and the federal executive remains somewhat limited.

The Special Status Option

Unlike its American counterpart, the Canadian constitutional system as it emerged in 1867 and subsequently developed does not provide precisely the same range of powers for all the provinces.

- In the British North America Act of 1867, there were several provisions reflecting the singularity of Quebec. Under section 133, for example, both the French and English languages were protected in the Legislature and courts of Quebec alone of the provinces. Sections 23(5) and 80 of the same Act were directed respectively toward guaranteeing the membership of English and French in the Senate of Canada and the Legislative Assembly of Quebec. But in terms of the projected special status for Quebec, section 94, which envisioned that the other provinces would subsequently agree to the consolidation of their powers over property and civil rights in a uniform code under Parliament's control, is of the greatest importance. It is an intriguing 'might-have-been' to imagine the federal system today if such an agreement had been secured in the context of the expansive interpretation of section 92(13) actually given by the Judicial Committee of the Privy Council.
- The provisions of section 93, relating to the educational rights of denominational minorities, established the basis for different patterns of such rights in the various provinces. Under section 93 these rights were limited to those that existed "by law" at the time of union or that would be enacted later. When British Columbia joined Confederation in 1871, no such rights existed in that province, and none have been established since. Under the 1949 Terms of Union between Canada and Newfoundland, the province's unique pattern of denominational education was to be protected, in effect, by appeals to the courts alone rather than, as in the other provinces under section 93, by appeals to the federal Cabinet and ultimately to the Parliament of Canada.
- When the different provinces entered Confederation after 1867, they assumed various forms of special status. Section 23 of the Manitoba Act of 1870 provided for the protection of the French and English languages in the Legislature and courts of that province; this provision was removed by Manitoba legislation in 1890, but restored by a decision of the Supreme Court of Canada in December 1979. When Prince Edward

Island joined Confederation in 1873, it was guaranteed steamboat service and telegraphic communication to connect it with the Canadian mainland. When Manitoba entered the Dominion in 1870 and Alberta and Saskatchewan became provinces in 1905, they were denied ownership of their natural resources; this arrangement lasted until 1930. Different provinces entered Confederation under different financial relationships with the Dominion.

It might be useful to classify three different kinds of status among Canada's provinces.

Special Status by Constitutional Definition

I have already outlined the different provisions relating to provinces under the BNA Act of 1867 and the circumstances under which the other provinces later joined Confederation. The Canadian situation might be compared to that of India and Yugoslavia, whose constitutions provide explicitly for different categories of sub-national governments. Although the United States Constitution gives all its states the same powers, Puerto Rico holds a unique position.

Special Status through Interdelegation

Under judicial interpretation of the Constitution by the Supreme Court of Canada, it is impermissible for either Parliament or a provincial Legislature to delegate its legislative powers one to the other, but such powers may be delegated to an administrative body operating under a law enacted by the other level of government. This device was used to confer on provincial boards the authority to regulate interprovincial trucking after the *Winner* decision of 1954 that upheld federal powers over such activities.[120] The Fulton-Favreau formula of 1964 called for unanimous provincial consent for amendments relating to the respective legislative powers of Parliament and the provinces, but this rigidity was to be tempered by a procedure permitting the delegation of federal legislative powers to groups of provinces by common consent and the delegation of a limited range of provincial powers by groups of provinces to Parliament. There were no proposals relating to delegation on the agenda of constitutional discussion from the mid-1960s until the publication of the Beige Paper. This document recommended constitutional provisions permitting the interdelegation of legislative powers between the federal government and the provinces by common consent, and provincial delegation of legislative and administrative powers to interprovincial agencies. Delegation of legislative powers between the federal and provincial governments was to be subject to ratification by the Federal Council; delegation was to be valid for a limited period of time only, and the delegating government(s) was/were to remain financially responsible for the activities delegated.

Special Status through Discretionary Methods Other than Interdelegation

There is nothing in the Canadian constitutional system that prevents particular patterns of relations between the federal government and individual provinces or groups of provinces. The major constitutional device that supports this freedom is the federal power to spend its revenues as it chooses even on activities within the constitutional jurisdiction of the provinces.[121] This and other procedures permit bilateral relations between Ottawa and individual provinces and allow for special status for provinces that possess the same range of legislative powers. Since the early 1960s there have been, for instance, several arrangements under which Quebec has assumed a special status by its sole acceptance of options that the law made available to all the other provinces.

- Quebec alone collects its own taxes on individual incomes and, along with Ontario, on corporate incomes.
- Quebec alone contracted out of several grant-in-aid programs under Parliament's Established Programs (Interim Arrangements) Act of 1965.
- Quebec alone controls its plan for contributory retirement pensions, while citizens elsewhere in Canada are under the Canada Pension Plan.
- Quebec alone administers its own program of government-guaranteed bank loans to students in post-secondary institutions, while elsewhere a federal scheme is in effect.
- Quebec and Ottawa have relations in respect to immigrants that have no counterparts in the other provinces.
- Quebec alone has made special arrangements for distributing federal family-allowance payments.

Arguments against special status, particularly in relation to Quebec, have often been based on the claim that such status would cause the more independent provinces to have less influence in the affairs of the central government than their populations warrant.

> The practical case against *statut particulier* is that, if Quebec is to have a range of autonomy significantly more extensive than that of the provinces with English-speaking majorities, it can expect less than a proportionate influence in the affairs of the federal government . . . Surely Quebec MPs and Senators — English- and French-speaking alike — will be precluded from influencing issues which are . . . to be within the jurisdiction of the Quebec authorities. Surely no Quebec politician will be able to aspire to a portfolio in a department which has crucial responsibilities elsewhere in Canada but few or none in Quebec. Surely it is unreasonable to contemplate increasing the bilingual competence . . . where federal powers in respect to Quebec are few and tangential.[122]

Subsequent events have caused some considerable modification of the position taken above: Quebec has acquired important elements of a *de facto* special status, while simultaneously Quebecers under the Pearson and Trudeau administrations came to take a more powerful part than ever before in the affairs of the central government. To take specific examples, the Minister of National Health and Welfare is responsible to Parliament for the Canada Pension Plan, but no one seems to have asked whether it was appropriate for Marc Lalonde and Monique Bégin to hold that portfolio recently because the Canada Pension Plan is not in force in Quebec. In 1978 some 25.2 per cent of the employees in the Department of National Revenue were francophones (This figure is to be compared with their service-wide average of 26.2 per cent.[123]), although the relationship of the Department to Quebec is unique in that the province collects its own taxes on individual incomes. It is not surprising, however, that in 1978 none of the employees of the Prairie Farm Rehabilitation Administration were francophones, and there were only thirty-four francophones among 970 employees in the Canadian Grain Commission and fifteen of 275 in the Veterans' Land Administration.[124] In the Cabinet recent Ministers of Agriculture have all come from Ontario and the Prairie provinces. Since the Department of Regional Economic Expansion was established in 1969, this portfolio has always been held by a person from a 'have-not' province, and since 1939 no Westerner has been Minister of Finance. Further research would be needed to analyse the activities of individual M.P.'s in the House of Commons itself and in its various committees, respecting matters that do not impinge directly on the provinces and regions from which those members come. On the whole, however, the different relations between Ottawa and the various provinces do not appear to cause difficulties or contention in the operation of the central government.

If, on the other hand, the special status of Quebec — or of any other province — made federal responsibilities for that province "few and tangential," complications for the institutions of the central government would certainly arise. During the 1960s one of the most persistent exponents of special status for Quebec was Jacques-Yvan Morin. Morin's 1964 formula was thoroughly dualistic and was based on "le *self-government* le plus complet possible pour le Québec et une intégration croissante pour les autres provinces."[125] According to this formula Quebec would acquire important new powers in respect to welfare, foreign affairs, taxation, and the Senate and Supreme Court of Canada. In fact such a special status as Morin proposed for the province was inconsistent with a proportionate influence of Quebecers in the institutions of the central government.

Scotland and, to a much more limited extent, Wales have special status in the governmental system of the United Kingdom, yet their status has not compromised the effective working of British parliamentary institutions. Under the Act of Union of 1707 that united the Kingdoms of England and Scotland, the latter was to retain its own system of law and its religious and educational systems, areas of autonomy dissimilar to those secured to Quebec under the BNA Act of 1867; in addition there is a distinctive Scottish system of local government. There is, moreover, a member of Cabinet who is Secretary of State for Scotland and a considerable administrative devolution in that the Scottish Education, Agriculture and Fisheries, Development, Home, and Health Departments are located in Edinburgh. In the House of Commons the Scottish Grand Committee, made up of all Scottish M.P.'s and enough of their colleagues to secure a reflection of the party composition of the House, debates the Scottish Estimates and the second reading of bills relating exclusively to Scotland, as well as more general Scottish affairs. Yet no one has seriously argued that this *statut particulier* has seriously compromised parliamentary institutions.

The Sovereignty-Association Option

The sovereignty-association option was elaborated in the document *Québec-Canada: A New Deal* made public by the Government of Quebec in November 1979.[126] The white paper reiterates the Parti québécois's complete commitment to sovereignty, which it defines as "the power to make decisions autonomously, without being subject in law to any superior or exterior power, which implies that the sovereign state has full jurisdiction over a given territory. Sovereignty ensures complete autonomy in the sense that the state enjoys full legal freedom in all fields; its authority is exercised to the exclusion of any other within the limits of its territory; and it can be present in the community of nations."[127] The authors of the white paper assume that since Canada is a common market and monetary union established and sustained by the terms of Confederation, it can be preserved as an economic community after Quebec and Canada become sovereign nations. The terms of the new Canada-Quebec union will be determined by a treaty of association. "This treaty will have an international status and will bind the parties in a manner and for a term to be determined. It will define the partners' areas of common activity and confirm the maintenance of an economic and monetary union between Québec and the rest of Canada. It will also determine the areas where agreement on goals will be considered desirable. Finally, it will establish the rules and institutions that will ensure the proper functioning of the Québec-Canada community, and determine its methods of financing."[128]

The Canada-Quebec economic community in its basic elements is thus a common market and monetary union. There will be a common tariff against foreign goods and arrangements for the free circulation of goods within Canada-Quebec, though these arrangements will be qualified by special agreement to protect agricultural products. There is to be a common currency and the free circulation of capital within the boundaries of Canada-Quebec, although each of the two nations will be free to adopt an investment code and to regulate certain financial institutions. There is to be free circulation of people, and citizens of neither country will need a passport to move about either permanently or temporarily in the other. In addition to these "areas of common action," there will be "areas of mutual understanding," where the two partners will harmonize their policies including those relating to transportation, the labour market, and defence. In the "Call to the Québec People" at the end of the white paper, René Lévesque tentatively suggests the broadening of common action to include "The Post Office? Railways? International air links? Reciprocity for minorities? Anything that does not affect each party's fundamental freedom to adopt its own laws, use its own resources as it pleases and remain in charge of its home."[129]

There are to be four Canada-Quebec institutions to regulate the economic community within the terms of the treaty of association:

- The chief executive agency is to be the community council made up of ministers of Quebec and Canada acting on instructions from their respective governments. In its activities "decisions pertaining to fundamental issues will require the agreement of both Québec and Canada."
- There will be a secretariat, the commission of experts, composed of specialists chosen by their respective governments and appointed for limited terms. In addition to acting as a secretariat to the council, the commission of experts will be responsible for liaison with international agencies in economic matters.
- The court of justice will have exclusive jurisdiction over the interpretation of the treaty of association, and its decisions will be final and binding on both parties. The court is to be made up of an equal number of judges appointed by each of the two governments for limited terms and a chairman chosen jointly by the two states.
- There will be a common monetary authority responsible for the monetary affairs of the union. This authority will be chaired by a governor named by each government alternately. There is also to be a board of directors with "seats allocated to each party . . . proportional to the relative size of each economy."

There are two fundamental and related principles underlying the structure and operations of the common Canada-Quebec institutions as proposed in the white paper. First, these institutions are international rather than supranational: that is, the common institutions have no important sphere of discretion independent of the two participating governments. Secondly the 'parity principle' by which these common institutions operate requires that decisions of their common authorities be subject to the approval of both Quebec and Canada.[130]

It might be argued, of course, that the provisions relating to the court of justice embody an element of supranationalism. The white paper is vague about the right of private parties to bring suits before the court on the allegation that one of the governments has breached the treaty of association. However, it seems inconsistent with the general spirit of the document that private persons or groups should have such a right; certainly private parties in one nation are unlikely to have the right to appeal against the actions of the government of the other. If the two nations may bring suit against each other, the work of the court will consist entirely of adjudicating conflicts between the Canadian and Quebec governments. In such circumstances the judges might be disposed to support the government that had appointed them even if the former were distinguished jurists and had, within their fixed terms of office, the normal safeguards of judicial independence possessed by members of senior courts of domestic jurisdiction. Even here the supranational principle is qualified.

The white paper contains two suggestions about the qualification of the principle of Canada-Quebec parity; one of these is specific and the other more general.

- First, the board of directors of the monetary authority will give the larger partner numerical superiority. However, as with the existing Bank of Canada and other central banks, the influence of the board counts for little, and the decisive power is held by the governor working within the final constraints imposed by the Minister of Finance and the government.
- Secondly the document states: "It is perfectly possible, indeed, to provide for special cases where the predominant interest of one of the parties would be recognized: Canada could have a decisive voice insofar as wheat is concerned, and Québec in the area of asbestos. Thus there is a whole range of possibilities which will be the object of studies and negotiations according to the interests of each party. The fundamental legal equality of the partners does not rule out some flexibility in the manner in which the community will function."[131] This general statement, however, does not in any significant way breach the parity principle.

This, then, is the Quebec government's plan for sovereignty-association. It is based on the assumption that after Quebec attains sovereignty, Canada-without-Quebec will continue as a single political community united to the extent, at least, that there will be a Canadian national government with the power to associate with Quebec and commit Canada to the range of matters regulated by the Canada-Quebec economic community. This assumption, however, has been challenged: "if there are ever negotiations on economic association, the talks will have a multilateral character. Whatever joint institutions might emerge from such bargaining also would have to include representatives from more than two entities . . . Quebec will eventually have to choose between full independence, without association, and some kind of linkages with other regions in a multi-member grouping."[132] A darker view forecasts the rapid disintegration of Canada that would follow Quebec's achieving sovereignty: "a political crisis of authority would erupt almost immediately once the desirability, or inevitability, of negotiating Quebec's independence had been conceded."[133] In such circumstances, of course, there would be no national government with the legal right or the power to associate with Quebec in the kind of economic union projected by the white paper.

If one accepts these conjectures as representing the inevitable results of Quebec's achieving sovereignty, there is nothing to be said about the sovereignty-association option beyond the statement that it is unavailable. Let us, however, accept, for purposes of discussion at least, the premise that the Quebec government is correctly assuming that Canda would continue as a single political and economic community after Quebec's secession. Two questions might be regarded as pertinent for the design of new political institutions. First, how profound are the differences in attitudes and interests with which the proposed institutions would deal? Secondly what are the projected abilities of the institutions to resolve conflict authoritatively? Let us look at the white paper scheme in the light of these two questions.

We could reasonably anticipate relatively serious conflicts of interest between Canada and Quebec over the activities of the economic community because of the different impacts of tariff and monetary policies on the economies of the two nations. In terms of tariffs, the 1975 report of the Economic Council of Canada confirms the conventional view that "the Canadian tariff of itself redistributes income from other parts of the country to Ontario and Quebec. This has contributed to a greater concentration of employment in the central provinces."[134] Quebec's attainment of sovereignty and the shift of the economic balance westward means, of course, that the regions standing to gain from lower tariffs would be relatively more powerful in

Canada-without-Quebec than under the present federal system; moreover, shorn of its alliance with Quebec, the power of Ontario to support relatively high tariffs would be reduced. The regional effect of monetary policies appears to have been less carefully investigated than has that of fiscal and tariff policies, but there is ample evidence that federal actions relating to the management of national demand have affected various regions differently. The white paper makes a curious statement about Canada-Quebec relations in the area of monetary policy. It asserts, no doubt accurately, that if the two nations had a common currency, it would be impossible for them to pursue different monetary policies because the effects of these would be nullified by adjustments in the flow of funds and interest rates. Similarly, Canada and Quebec could not have different exchange-rate policies. Yet, despite the necessity for common policies, it is reasonable to suppose that, as with tariffs, there would be serious and prolonged conflicts between Canada and Quebec over their nature.

Assuming conflicts of interest between Quebec and Canada in matters affecting the interest of the new economic community, how adequate are the institutions proposed by the white paper for achieving their definitive resolution? The answer is plain: the white paper's suggestions are a design for deadlock. The parity principle embodied in the double veto of the two governments over all significant aspects of the association's activities makes such deadlock almost inevitable. But there is another and less obvious difficulty in achieving the resolution of Canada-Quebec conflicts in these matters. The small number of issues on which the two sides agree makes complex trade-offs unlikely. Let us consider, for example, the response to some international arrangement for lowering tariffs on a commodity produced entirely, or almost entirely, in one of the two nations. The burdens of adjustment would have to be borne exclusively by the industry and those dependent on it and by the government of the nation in which that industry was located. Under the existing federal system, the central government has a very broad range of compensatory instruments that it may use to make national policies at least minimally tolerable to the various provinces and regions. For the most part, the Canada-Quebec authorities lack such instruments. It must be admitted, of course, that the economic union could be extended beyond its common-market and monetary dimensions, and such extension would facilitate more complex trade-offs. Yet, because of the larger population and greater resources of Canada, it might be expected that that nation would hesitate to surrender its freedom of action to a smaller community with fewer people and smaller resources, and would require a strongly compelling demonstration of the need to do so in each particular instance.

If we assume that Canada will continue as a federal political community after Quebec has achieved sovereignty, what would be the likely impact of federal-provincial relations on the operations of the Canada-Quebec association? It is reasonable to believe that the provinces would demand as much influence as they now have over the formation and implementation of tariff and monetary policies. And if the provinces were largely successful in their demand, the Government of Quebec, labouring under no such domestic constraints, might well find Canadians difficult partners in the affairs of the association. Further, if present experience is any guide, the government of Canada would have few effective powers to prevent the provinces from erecting barriers to the free movement of the factors of production within the boundaries of Canada-Quebec, even where such barriers were contrary to the spirit and terms of economic association.

Economic association, too, as proposed by the white paper, would appear to make the Canada-Quebec union an ineffectual and perhaps unreliable agent in the international economic arena. Although this matter seems not to have been studied, it appears that even now the federal authorities operate under certain disabilities in such areas as the General Agreement on Tariffs and Trade (GATT) negotiations because of the successful demand of the provinces that they be consulted about these matters. Yet, despite its yielding to such demands, Ottawa has never surrendered the power of the national government to negotiate on behalf of Canada in respect to tariffs and to commit this country to particular international arrangements on the basis of its negotiations. Obviously the Canada-Quebec authorities would have no such powers independent of their national governments, and the association would be at a serious disadvantage in dealing with other jurisdictions that had more effective means of resolving internal conflicts.

In more general terms[135] the Quebec white paper is deficient in its failure to evaluate the institutional costs of the proposed economic association. It is not within the scope of my analysis to assess the economic benefits of a continuing common market and monetary union after Quebec becomes a sovereign power, or the extent to which these presumed benefits could be realized under the scheme proposed by the white paper. (It may be said, however, that the document appears to suppose that the failure to form an economic association would lead to the cessation of all economic intercourse between the two nations, a situation that could be expected to develop only if there were extraordinarily high levels of political tension between Quebec and Canada.) The institutional costs are that each of the sovereign nations would surrender to the veto of the other its freedom of action in forming the most important economic policies. Conflicts of interest between Quebec and Canada in trade and monetary policies appear inevitable. Under these circumstances the proposed institutional arrangements are indeed a design for deadlock.

The 'Sovereignty Neat' Option

It is impossible to be other than highly speculative about Canada-Quebec relations and common institutions, given that both nations become sovereign without the kind of economic association proposed by the Quebec white paper. Under one set of possible conditions, the rupture between the two nations would engender such mutual hostility that no collaboration would follow. Under other circumstances a very wide range of collaborative activities could be undertaken, and the 'sovereignty neat' option would be very much like that of sovereignty-association without a common judicial authority to interpret definitively the legal elements of Canada-Quebec relations. Under yet other circumstances there might be a relatively harmonious pattern of relations between the two nations, with either or both of them preferring to interact, for the most part, within a multilateral, rather than a bilateral, framework.

Perhaps the most relevant model for speculation about Canada-Quebec relations under 'sovereignty neat' is that supplied by Canada–United States relations. An article published in 1974 examined some eighteen Canada–United States intergovernmental institutions established between 1909 and 1967. Its general conclusion was this: "It is clear that the eighteen institutions, some of which remain in a state of suspended animation, do not handle the bulk of Canadian-American relations. Indeed most transactions between Ottawa and Washington are dealt with through direct informal contacts between subunits of the bureaucracies."[136]

Another study of Canada–United States economic relations published in the same year came to the same conclusion: "Though the number of joint Canada–United States agencies has grown since 1909 [the date of the establishment of the International Joint Commission], most of them are simply committees that meet from time to time for the exchange of information or for offering advice to the two governments on specific problems. There is no interest, at least on the Canadian side, in changing these bodies into more authoritative institutions with staffs of their own and wider spheres of jurisdiction."[137]

In a period of relatively amicable relations between the two nations, the Canadian government of the mid-1960s rejected the proposal of the Merchant-Heeney report for the establishment of a Joint Committee on Trade and Economic Affairs composed of "deputies which [*sic*] could meet frequently on behalf of their principals and be available at short notice to consider any emergent problem."[138] During the early 1970s, when economic relations between the two nations became more strained, the earlier patterns of informal contacts gave way to more formal relations and an increasing disposition of the two governments to link issues in bargaining and negotiations; but there was no tendency to create new institutions to regulate those relations.

It is my conjecture — and conjecture only — that if Canada and Quebec became sovereign, the general outlines of the Canadian-American model would recur, and there would be a very limited reliance on formal institutions that were bilateral. In a different context it has been pointed out that Canadians are disposed against supranationalism; they prefer to advance Canadian interests through such associations as those with the Commonwealth and the United Nations, where national freedom of action is not, in a formal way, at least, circumscribed. Moreover, in their stances towards the Empire/Commonwealth, Canadians have been unwilling to allow a prior pattern of political integration to be used as a rationale for limiting subsequent exercises of national discretion. It seems reasonable, then, to speculate that in the event of Quebec achieving sovereignty, the historic Canadian disposition against formal supranational institutions would again be activated.

Notes

1. I omit the workings of judicial institutions because this matter is in the capable hands of Peter Hogg and his colleagues on the Donner project.

2. A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 7th ed. (London: Macmillan, 1908), p. 140.

3. J.D. Whyte and W.R. Lederman, *Canadian Constitutional Law*, 2d ed. (Toronto: Butterworths, 1977) and Bora Laskin, *Canadian Constitutional Law*, 3d ed. (Toronto: Carswell, 1966).

4. K.C. Wheare, *Federal Government*, 3d ed. (London: Oxford University Press, 1953), pp. 11–14.

5. R.L. Watts, "Second Chambers in Federal Political Systems," in Ontario Advisory Committee on Confederation, *The Confederation Challenge*, vol. 2 (Toronto: Queen's Printer, 1970), p. 331.

6. The terms 'interstate federalism' and 'intrastate federalism' were used by Karl Loewenstein in his *Political Power and the Governmental Process*, 2d ed. (Chicago: University of Chicago Press, 1965), pp. 405–7. However, my way of using these terms differs from Loewenstein's. The first systematic attempt to apply intrastate perspectives to the Canadian system was made by Donald Smiley in his "The Structural Problem of Canadian Federalism," *Canadian Public Administration* 14 (Fall 1971):326–43.

7. Watts, "Second Chambers in Federal Political Systems," p. 327.

8. Federal-Provincial Conference, 1963, *Proceedings* (Ottawa: Queen's Printer, 1964), p. 46.

9. Constitutional Conference, 1963, *Proceedings*, first meeting (Ottawa: Queen's Printer, 1964), pp. 1–9. For a more detailed account of federal strategy at the time, see the Right Honourable Lester B. Pearson, *Federalism for the Future* (Ottawa: Queen's Printer, 1968).

10. Canada, Parliament, Special Joint Committee of the Senate and of the House on the Constitution, *Final Report*, part III, "Federal Institutions" (Ottawa: Queen's Printer, 1972).

11. *The Constitutional Amendment Bill: Text and Explanatory Notes* (Ottawa: Minister of Supply and Services, Canada, 1978).

12. Canadian Bar Association, *Towards a New Canada* (Toronto, 1978).

13. Ontario, Advisory Committee on Confederation, *First Report* (Toronto, April 1978) and *Second Report* (Toronto, March 1979).

14. Government of Alberta, *Harmony in Diversity: A New Federalism for Canada* (Edmonton, 1978).

15. Canada, Task Force on Canadian Unity, *A Future Together* (Ottawa: Minister of Supply and Services Canada, 1979) (The Pepin-Robarts Report).

16. Government of British Columbia, *British Columbia's Constitutional Proposals* (Victoria, 1978).

17. Constitutional Committee of the Quebec Liberal Party, *A New Canadian Federation* (Montreal, 1980). Hereinafter referred to as the 'Beige Paper'.

18. Alan Cairns, "From Interstate to Intrastate Federalism," Discussion Paper (Kingston: Queen's University, Institute of Intergovernmental Relations, 1979), p. 3.

19. Watts, "Second Chambers in Federal Political Systems."

20. Peter Waite, *Life and Times of Confederation, 1864–1867*, Chapter 7, "Confederation and the Federal Principle" (Toronto: University of Toronto Press, 1962).

21. Dicey, *Introduction to the Study of the Law of the Constitution*, and Wheare, *Federal Government*.

22. Waite, *Life and Times of Confederation*, pp. 110–11.

23. *Ibid.*, p. 147.

24. W.L. Morton, "The Cabinet of 1867," in Frederick W. Gibson, ed., *Cabinet Formation and Bicultural Relations; Seven Case Studies*, Royal Commission on Bilingualism and Biculturalism, Study No. 6 (Ottawa: Queen's Printer, 1970), p. 5.

25. See Monck's letter to John A. Macdonald of 14 May 1867. Sir Joseph Pope, *Memoires of the Right Honourable Sir John Alexander Macdonald, G.C.B.* (Toronto: Musson, n.d.), p. 338.

26. Morton, "The Cabinet of 1867," p. 2. Morton also said: "The first federal cabinet was not a party cabinet — even to the extent that such a term may be used of cabinets in the middle of the nineteenth century, when party ties were loose and party organization tight. Confederation, broadly speaking, has been planned and carried in the three pre-1867 provinces of Nova Scotia, New Brunswick and Canada, by coalitions," p. 1.

27. Jean Hamelin, *The First Years of Confederation*, Centennial Historical Booklet No. 3 (Ottawa: Centennial Commission, 1967), pp. 3–4.

28. Frederick W. Gibson, ed., "Conclusions," in *Cabinet Formation and Bicultural Relations; Seven Case Studies*, Royal Commission on Bilingualism and Biculturalism, Study No. 6 (Ottawa: Queen's Printer, 1970), p. 171.

29. See Escott M. Reid's classic essay, "The Rise of National Parties in Canada," in Hugh C. Thorburn, ed., *Party Politics in Canada*, 4th ed. (Scarborough: Prentice-Hall, 1979), pp. 12–20.

30. Thomas Hockin, "Flexible and Structured Parliamentarism: From 1848 to Contemporary Party Government," *Journal of Canadian Studies* 14 (Summer 1979), p. 9.

31. *Ibid.*, p. 11. According to reasoning I do not find completely conclusive, Roman March has attributed much of the looseness of party discipline in early Parliaments to the circumstance that a very high proportion of M.P.'s were "notables and aristocrats" who, because of their social and economic status, were more able and willing to resist party discipline than their successors have been. See Roman R. March, *The Myth of Parliament* (Scarborough: Prentice-Hall, 1974), pp. 57–59.

32. Reid, "The Rise of National Parties in Canada," p. 16. "It was only by 1878 that the Ontario-Quebec parties had conquered most of eastern Canada. That was the election . . . in which the ballot was introduced and elections were held simultaneously in all but four of the eastern constituencies. Of the 141 eastern members of parliament all but one did so as supporters of that leader whom they had supported in the first session of the parliament of 1874 . . . The result was that the Toronto *Globe* and the Montreal *Gazette* disputed over the party affiliations of only five members instead of the thirty-five of 1872, and it was possible to discover the approximate strength of the parties as soon as the ballots were counted."

33. See Hockin, "Flexible and Structured Parliamentarism," pp. 11–14; and John Stewart, *The Canadian House of Commons: Procedure and Reform* (Montreal: McGill-Queen's University Press, 1977), particularly pp. 12–14.

34. The failure of the Progressives to remain an influential force in federal politics in the general election of 1921, when they won sixty-four seats, can in large part be explained by their failure to sustain party cohesion and discipline because of the anti-party opinions held on principle by many Progressive M.P.'s and the movement they represented.

35. Province of Canada, *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces*, 3d sess., 8th Provincial Parliament of Canada (Quebec: Hunter, Rose & Co., 1865), p. 88.

36. Robert A. MacKay, *The Unreformed Senate of Canada*, rev. ed. (Toronto. McClelland and Stewart, 1963), p. 43.

37. Waite, *Life and Times of Confederation*, p. 108.

38. J.E. Hodgetts, *Pioneer Public Service: An Administrative History of the United Canadas, 1841–1867* (Toronto: University of Toronto Press, 1955), pp. 274–80.

39. *Ibid.*, p. 275.

40. See Robert MacGregor Dawson, *The Civil Service of Canada*, Part I (London: Oxford University Press, 1929).

41. Quoted in Norman Ward, "Responsible Government: An Introduction," *Journal of Canadian Studies* 14 (Summer 1979), p. 3.

42. Richard J. Van Loon and Michael S. Whittington, *The Canadian Political System: Environment, Structure and Process*, 2d ed. (Toronto: McGraw-Hill Ryerson, 1976), Table 13–2, p. 317.

43. *Ibid.*

44. Gibson, *Cabinet Formation and Bicultural Relations*.

45. *Ibid.*

46. Hamelin, *The First Years of Confederation*.

47. *For one of the best accounts of these new patterns, see Richard D. French, How Ottawa Decides: Planning and Industrial Policy-Making 1968–1980* (Toronto: James Lorimer for Canadian Institute for Economic Policy, 1980).

48. George Radwanski, *Trudeau* (Toronto: Macmillan, 1978), pp. 272–74.

49. Colin Campbell, *The Canadian Senate: A Lobby from Within* (Toronto: Macmillan, 1978), p. 10.

50. There are no conflict-of-interest laws or conventions related to Senate membership. This circumstance gives Senators an unusual freedom here.

51. R.H.S. Crossman, "Introduction," in Walter Bagehot, *The English Constitution* (Ithica, N.Y.: Cornell University Press, 1976).

52. *Ibid.*, pp. 51–52.

53. Denis Smith, "President and Parliament: The Transformation of Parliamentary Government in Canada," in Thomas A. Hockin, ed., *Apex of Power*, 2d ed. (Scarborough: Prentice-Hall, 1977), pp. 308–25.

54. Radwanski, *Trudeau*, p. 189.

55. See Alan C. Cairns, "The Electoral System and the Party System in Canada, 1921–1965," *Canadian Journal of Political Science* 1 (March 1968): 55–80.

56. *Ibid.*, p. 62.

57. Cairns, "The Electoral System and the Party System," pp. 69–70.

58. William Irvine, *Does Canada Need a New Electoral System?* (Kingston: Queen's University, Institute of Intergovernmental Relations, 1979), p. 77.

59. *Ibid.*, p. 13 and p. 90.

60. J.A.A. Lovink, "The Impact of the Electoral System on the Party System in Canada," in Hugh G. Thorburn, ed., *Party Politics in Canada*, 4th ed. (Scarborough: Prentice-Hall, 1979), p. 114.

61. C.E.S. Franks, "The Dilemma of the Standing Committees of the Canadian House of Commons," *Canadian Journal of Political Science* 4 (December 1971), p. 461.

62. Stewart, *The Canadian House of Commons*, p. 168.

63. *Ibid.*, p. 284.

64. Mark MacGuigan, "Backbenchers, the New Committee System and the Caucus," in Paul Fox, ed., *Politics: Canada*, 4th ed. (Toronto: McGraw-Hill Ryerson, 1977), pp. 436–37.

65. MacKay, *The Unreformed Senate of Canada*, pp. 112–23.

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67. Hodgetts, *Pioneer Public Service*, p. 57.

68. Canada, Royal Commission on Bilingualism and Biculturalism, *Report*, Book III A, p. 101.

69. *Ibid.*, p. 209.

70. Canada, Public Service Commission, *Annual Report, 1978* (Ottawa: Minister of Supply and Services Canada, 1979), Vol. 2, Table 3, p. 2.

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72. Canada, Public Service Commission, *Annual Report*, p. 38.

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74. J.E. Hodgetts *et al.*, *The Biography of an Institution: The Civil Service Commission of Canada, 1908–1967* (Montreal: McGill-Queen's University Press, 1972), pp. 403–7.

75. Pierre Elliott Trudeau, "Quebec on the Eve of the Asbestos Strike," in Ramsay Cook, ed., *French Canadian Nationalism* (Toronto: Macmillan, 1969), p. 33.

76. Herbert Bakvis, "French Canada and the 'Bureaucratic Phenomenon'," *Canadian Public Administration* 21 (Spring 1978): 103–24.

77. Christopher Beattie, *Minority Men in a Majority Setting: Middle Level Francophones in the Canadian Public Service* (Toronto: McClelland and Stewart, 1975).

78. M. Janine Brodie and Bruce D. Macnaughton, "Legislators versus Bureaucrats: The Norms of Governing Canada," in Harold D. Clarke *et al.*, eds., *Parliament, Policy and Representation* (Toronto: Methuen, 1980), pp. 247–48.

79. Michael Orenstein, "Capital and the Canadian State," (Toronto: York University, The Institute for Behavioural Research, 1980), mimeo, p. 19.

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81. *Ibid.*, Chapter 5, "Conclusions and Recommendations."

82. Caroline Andrew and Réjean Pelletier, "The Regulators," in G. Bruce Doern, ed., *The Regulatory Process in Canada* (Toronto: Macmillan, 1978), pp. 155–57.

83. *Ibid.*, p. 157.

84. John Meisel, "The Decline of Party in Canada," in Hugh G. Thorburn, ed., *Party Politics in Canada*, 4th ed. (Toronto: Methuen, 1978), pp. 120–21.

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86. Conrad Winn *et al.*, *Political Parties in Canada* (Toronto: McGraw-Hill Ryerson, 1976).

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88. See Donald V. Smiley, "The National Party Leadership Convention in Canada: A Preliminary Analysis," *Canadian Journal of Political Science* 1 (December 1968): 373–97.

89. See p. 26 and note 17 above.

90. Donald V. Smiley, "Federalism and the Legislative Process in Canada," in W.A.W. Neilson and James C. MacPherson, eds., *The Legislative Process in Canada* (Montreal: The Institute for Research on Public Policy, 1978), p. 85.

91. Irvine, *Does Canada Need a New Electoral System?*, pp. 53–54.

92. Ronald C. Landes, "Alternative Electoral Systems for Canada," paper presented to the Annual Meeting of the Canadian Political Science Association, Montreal, June 1980, mimeo.

93. Irvine, *Does Canada Need a New Electoral System?*, p. 74.

94. *Ibid.*, p. 77.

95. J. Stefan Dupré and Paul C. Weiler, "A Sense of Proportion and a Sense of Priorities: Reflections on the Report of the Task Force on Canadian Unity," *Canadian Bar Review* 57 (September 1979): 446–71.

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97. Sheila McLeod Arnopoulos and Dominique Clift, *The English Fact in Quebec* (Montreal: McGill-Queen's University Press, 1980), Chapter 5, "The Mediation of the Federal Liberal Party."

98. Special Joint Committee of the Senate and of the House on the Constitution, p. 97.

99. Stewart, *The Canadian House of Commons*, p. 284.

100. This characteristic appears to arise from the strong convention that governments remain in power only as long as they command parliamentary majorities. See p. 41 above.

101. Stewart, *The Canadian House of Commons*, p. 14.

102. The Beige Paper, p. 52.

103. *Ibid.*, p. 53.

104. *Ibid.*

105. Ian Macdonald, President of York University, in private conversation.

106. Smiley, *Canada in Question*, Chapter 6.

107. Schultz, *Federalism and the Regulatory Process*, p. 87.

108. *Ibid.*, pp. 76–83.

109. *Ibid.*, pp. 85–91.

110. Gordon Robertson, "The Role of Interministerial Conferences in the Decision Making Process," in Richard Simon, ed., *Confrontation and Collaboration: Intergovernmental Relations in Canada Today* (Toronto: Institute of Public Administration of Canada, 1979).

111. Melvin H. Smith, mimeo, pp. 1–2.

112. Alan Cairns, "From Interstate to Intrastate Federalism in Canada," pp. 10–12.

113. Quoted in Cairns, "From Interstate to Intrastate Federalism," p. 10.

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116. Ontario, Advisory Committee on Confederation, *First Report*, p. 2.

117. *Ibid.*, p. 2.

118. Cairns, "From Interstate to Intrastate Federalism," p. 10.

119. Arnopoulos and Clift, *The English Fact in Quebec*.

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128. *Ibid.*, p. 57.

129. *Ibid.*, p. 108.

130. Peter Leslie, "Equal to Equal: Economic Association and the Canadian Common Market," Discussion Paper (Kingston: Queen's University, Institute of Intergovernmental Relations, 1979), pp. 26–27.

131. Québec, Conseil exécutif, p. 61.

132. Leslie, "Equal to Equal," p. 29.

133. Garth Stevenson, *Unfulfilled Union: Canadian Federalism and National Unity* (Toronto: Macmillan, 1979), p. 246.

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Administration of Justice: An Introduction

(An introduction to the topic of Administration of Justice with special reference to criminal justice.)

PETER W. HOGG
York University

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Administration of Justice

Introduction

In conformity with the terms of reference of the Project on Constitutional Change, this study considers the implications for some aspects of the administration of justice — primarily criminal justice — of the four constitutional options contemplated by the Project.

It must be recognized that constitutional debate concerning the administration of justice usually bears only a tenuous relationship to the better realization of the goals of the administration of justice. It is widely agreed, for example, that a court should be staffed by well qualified judges and that those judges should be unbiased and should appear to be unbiased. But proposals to alter the federal power of appointment to the Supreme Court of Canada and to the superior, district, and county courts of the provinces do not proceed from any plausible demonstration that federal appointment yields judges who are poorly qualified or who are likely to lean in the federal direction. Again, it is widely agreed that it is undesirable to waste the time of judges and lawyers in sterile jurisdictional disputes, and even more undesirable to engage in multiple lawsuits to resolve a single dispute. Yet this waste is the inevitable result of the parallel federal court system that was created in 1875 and that has been steadily expanded ever since. It is widely agreed, moreover, that criminal laws should be enforced by police and prosecutors who are responsive to local conditions and sentiments. Yet this common ground hardly supports the position that all federal criminal law should be enforceable only by the grace of a province. In these and other matters, the positions asserted on behalf of each level of government are often demands for increased status and power for that level of government rather than for the improvement of the administration of justice.

What the constitutional debate demonstrates is that the administration of justice must reflect some of the fundamental federal ideas of dualism and regionalism if it is to be an acceptable and enduring part of Canada's system of government. "Objections to constitutional proposals based solely on the view that they may make the administration of justice more complex or less efficient must be balanced against the larger concern of developing a Constitution which gives the fullest possible expression to the most basic political and social ideals of the Canadian people."[1]

It is pertinent, then, to examine the implications for the administration of justice — not forgetting other "basic political and social ideals" — of making various changes in the division of responsibility between Canada's federal and provincial governments.

Existing Law

It is not necessary to give an exhaustive account of the Canadian constitutional law relating to the administration of justice,[2] but only to describe those elements of the law that are especially important or interesting from the point of view of constitutional change.

Section 92(14)

The British North America (BNA) Act by section 92(14) allocates to each provincial Legislature the power to make laws relating to "the administration of justice in the province, including the constitution, maintenance, and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts." This power authorizes each Legislature to establish the courts of the province. In most provinces, too, the court systems were established before the province entered Canada; these courts retained their powers under section 129 of the BNA Act, and their organization and jurisdiction remained the responsibility of the province by virtue of section 92(14).

Section 101

The primary federal power over the administration of justice is contained in section 101 of the BNA Act, which provides: "The Parliament of Canada, may, notwithstanding anything in this Act, from time to time provide for the constitution, maintenance, and organization of a general court of appeal for Canada, and for the establishment of any additional courts for the better administration of the laws of Canada." This power authorizes the federal Parliament to establish federal courts. It will be noticed that the establishment of two kinds of courts is contemplated. The first is "a general court of appeal for Canada." Under this branch of section 101, the federal Parliament, in 1875, established the Supreme Court of Canada.[3] The second portion of section 101 authorizes the establishment of "additional courts for the better administration of the laws of Canada." Under this branch of section 101, the federal Parliament, in 1875, established the Exchequer Court of Canada[4] and in 1971 replaced it with the Federal Court of Canada.[5]

Jurisdiction of Provincial Courts

The division of jurisdiction between the provincial and federal courts does not follow the same lines as the division of legislative responsibility in the BNA Act. On the contrary, the province has the power to invest the provincial courts with jurisdiction over the full range of cases whether the applicable law is federal or provincial or a mixture of both. The federal Parliament can, if it chooses, stipulate the forum of adjudication over matters within its legislative competence: it may assign jurisdiction to a federal court or federal agency, or it may assign jurisdiction to a provincial court or provincial agency. But if federal law is silent about the forum of adjudication, the appropriate forum will be the provincial, not the federal, courts. Indeed, for several years after Confederation, there were no federal courts at all. When the Exchequer Court was established in 1875, its jurisdiction was very narrow so that most federal questions were still litigated in the provincial courts. Even the much expanded jurisdiction of the Federal Court of Canada does not encompass all the litigation that arises in areas of federal legislative competence.[6]

Jurisdiction of the Federal Court of Canada

Unlike the provincial courts, the federal courts (except for the Supreme Court of Canada) are constitutionally confined to a jurisdiction that does not extend beyond the body of federal law. This is because the second branch of section 101 authorizes only the establishment of courts "for the better administration of the laws of Canada." The Supreme Court of Canada has decided that the Federal Court of Canada, like its predecessor, the Exchequer Court of Canada, cannot be given jurisdiction over cases governed by provincial statute law or provincial common law. Only where the case is governed by a federal statute (or possibly by a rule of "federal common law") can the Federal Court of Canada be invested with jurisdiction to hear the case.[7] This limitation on federal jurisdiction is in marked contrast to the general jurisdiction of the provincial courts, which is not limited to cases governed by provincial law.

Jurisdiction of the Supreme Court of Canada

The Supreme Court of Canada was not established in the BNA Act itself, but section 101 of that Act authorized the federal Parliament to "provide for the constitution, maintenance, and organization of a general court of appeal for Canada." The Supreme Court of Canada was established under this power by federal statute in 1875.[8] It is a 'federal' court in the technical sense that it is established and empowered by the federal Parliament, and its judges are appointed by the federal government. But, unlike the Federal Court of Canada, the jurisdiction of the Supreme Court of Canada is not limited to cases arising under federal laws. It is, as section 101 declares, a "general court of appeal for Canada," hearing appeals from the provincial courts as well as the federal courts in cases covering the entire gamut of the law, federal, provincial, or a mixture of both. It is the final authority on the entire body of Canadian law.

When the Supreme Court of Canada was first established, the right to appeal to the Privy Council was retained. This meant that the decisions of the provincial appellate courts, as well as those of the Exchequer Court, were subject to two appeals: first to the Supreme Court of Canada and from there to the Privy Council. There were also *per saltum*[9] appeals from the provincial appellate courts directly to the Privy Council, by-passing the Supreme Court of Canada. With the abolition of Privy Council appeals in 1949, the Supreme Court of Canada became the exclusive court of appeal from the provincial appellate courts.

The existence of ultimate appellate authority in a single central court has the effect of securing the uniformity of the common law throughout Canada[10] and a uniform interpretation of comparable provincial statutes, as well as of federal statutes. The uniformity of law is obviously in opposition to the ideal of federalism that would allow the bodies of case law within provincial jurisdiction to develop in their own distinctive fashion. This is what happens in the United States, where the Supreme Court of the United States has no jurisdiction over purely 'state' questions; such questions may be litigated no further than the highest court of a state. When a question of state law is presented to the Supreme Court of the United States in a case over which it does have jurisdiction,[11] the court defers to the law laid down by the highest court of that state.[12] The Supreme Court of Canada, like the Privy Council before it, does not defer to the highest court of a province even when the issue is governed by the civil law of Quebec (in which only three of its nine judges would have been trained) or by a unique provincial statute (with which none of the judges may have previously been familiar).

The Supreme Court of Canada is also "the umpire of Canadian federalism" because, in cases raising constitutional issues, whether they originate in the provincial courts or in the federal courts, appeals may be taken to the Supreme Court; and most important constitutional cases are, in fact, appealed. The Supreme Court also has original jurisdiction over questions 'referred' to the court for decision by the federal government, and the reference procedure is used mainly to litigate constitutional issues. It is not surprising that a federal system that accepts judicial review of legislation should confer final authority in constitutional questions on the highest court of the land. But there has been considerable criticism of the fact that in Canada the court is a creature of federal statute law, which could legally be abolished by the federal Parliament, and of the fact that the judges of the court are appointed only by the federal government. The argument is that justice in federal-provincial controversies would be more clearly seen to be done if the court were entrenched in the Constitution and if the judges were appointed by, or with the consent of, the provinces, as well as that of the federal government.

Appointment of Judges

Classical federalism would seem to call for federal courts to be staffed by judges appointed by the federal government, and for provincial courts to be staffed by judges appointed by the provinces. This is the pattern with respect to the federal courts: in accordance with section 101 of the BNA Act, all judges of the Federal Court of Canada and the Supreme Court of Canada are appointed by the federal government. This is also the pattern with respect to the 'inferior' courts of each province: in accordance with sections 92(4) and 92(14) of the BNA Act, the judges or magistrates or justices of the peace who preside over courts other than the superior, district, and county courts of each province are appointed by the province. But this is not the pattern with respect to the superior, district, and county courts, that is to say, the higher courts of each province.

Section 96 of the BNA Act provides: "The Governor General shall appoint the judges of the superior, district, and county courts in each province, except those of the courts of probate in Nova Scotia and New Brunswick." This section requires that appointment to "the superior, district, and county courts of each province" be made, not by the provincial government, but by the federal government. The explanation for this anomaly seems to be a theory held at the time of Confederation that federal appointment would reinforce judicial independence by insulating the judges from local pressures. However, the plenary character of the jurisdiction of the provincial courts that determine federal, as well as provincial, questions provides a more plausible, if not compelling, justification for at least some involvement by the federal government in the provincial court system.

The interplay of section 96 with section 92(14) (provincial power over the administration of justice) results in 'compulsory co-operative federalism'. The province must establish all the provincial courts and determine the details of their organization, including the number of judges to be appointed, but the actual appointments to the superior, district, and county courts must be made by the federal government. The BNA Act also provides, by sections 97 and 98, that the judges of a province's superior, district, and county courts must be selected from the bar of that province. Section 99 guarantees the tenure of the judges of the superior courts — but not of the judges of the district and county courts — during good behaviour; this provision is modelled on the Act of Settlement of 1701. Section 100 provides that the salaries of all the federally appointed judges must be "fixed and provided by the Parliament of Canada."

The federal appointment of provincial judges is not only anomalous in terms of federal theory, but also imposes some restraints on provincial power over the administration of justice. The fact that the province must look to the federal government to staff the province's higher courts and to fix and provide the salaries of the judges is an obvious and important restraint on provincial power. But section 96 and the other provisions relating to courts have also been held to impose other, less obvious, but perhaps no less important, restraints. The courts have held that these sections implicitly prohibit the provinces from investing any court or tribunal with jurisdiction of a kind that ought properly to belong to a superior, district, or county court unless the court or tribunal satisfies the requirements of section 96 and the like sections. This means that a court or tribunal will be invalidly constituted unless its members (1) are appointed by the federal government in conformity with section 96, (2) are drawn from the bar of the province in conformity with sections 97 and 98, and (3) receive salaries that are fixed and provided by the federal Parliament in conformity with section 100.

The result of this theory is that whenever a new jurisdiction is conferred upon an inferior court or the jurisdiction of an inferior court is expanded, the grant of jurisdiction may be constitutionally vulnerable on the ground that a 'section-96 jurisdiction' has been conferred on a body that is not a 'section-96 court'. The Supreme Court of Canada recently held, for example, that an increase from $200 to $500 was valid, in the pecuniary limit of the jurisdiction of the Quebec Magistrate's Court, now called the 'Provincial Court';[13] but the Quebec Legislature followed this decision by moving the limit up to $3000.[14] Whether this large subsequent increase would be upheld cannot be predicted with complete confidence. In another recent case the Supreme Court of Canada held that a transfer from the Quebec Superior Court to the Provincial Court of the power to quash municipal by-laws on grounds of illegality was unconstitutional; the power to quash municipal by-laws, the court held, could only be conferred on a 'section-96 court'.[15]

The same kind of reasoning imposes restraints on the creation of administrative tribunals by the provinces. A provincially appointed administrative tribunal may not be invested with functions that ought properly to belong to a superior, district, or county court. Needless to say, a broad application of this doctrine would seriously inhibit the creation of administrative tribunals to carry out the specialized adjudicatory functions that are often required by governmental schemes of workmen's compensation, labour law, urban planning, income support, occupational licensing, expropriation, detention of the mentally ill, pollution control, marketing of natural products, securities' regulation, and human rights' protection, to name just a few of the areas of provincial jurisdiction that require adjudication. It is not satisfactory to insist that adjudication must be carried out by a superior, district, or county court because the whole point of creating an administrative tribunal to administer a statutory scheme is to move adjudication away from the ordinary courts and into a forum that will be more sensitive to the special requirements of the statutory scheme, and that will adopt rules, procedures, and policies suited to that scheme.

Fortunately the courts have accepted that most forms of administrative adjudication do not lie within section 96 and so can be validly exercised by provincially appointed tribunals. Even where questions of law may be decided by the tribunal, the Supreme Court of Canada has upheld the jurisdiction, emphasizing that it is necessary to examine not merely "the detached jurisdiction or power alone," but rather "its setting in the institutional arrangements in which it appears."[16] In a few cases, however, departures have been made from this properly restrained appreciation of provincial administrative structures: one of these involved the Quebec Transport Tribunal,[17] and three resulted in the transfer of certain of the functions of the Ontario Municipal Board to a superior court.[18] These cases remind us that the provinces are still subject to some unpredictable, but real, constraints in establishing and empowering administrative tribunals.

A closely related question is whether a province, having validly established and empowered an administrative tribunal, may immunize the decisions of that tribunal from judicial review. Some writers have argued that section 96 and other like provisions of the BNA Act implicitly guarantee that the decisions of administrative tribunals must be subject to review by a superior court on questions of law or at least on questions of jurisdiction.[19] On this basis a clause in a provincial statute framed to exclude judicial review of a tribunal's decisions would be unconstitutional. Other writers have disagreed,[20] and the case law is inconclusive. Unless or until the cases establish that such provincial clauses are valid, this is another restriction on provincial legislative power caused by section 96 and the other related sections of the BNA Act.

Section 96 and the other related sections of the BNA Act apply only to the provincial courts.[21] The federal government is not constitutionally obliged to adhere to the BNA Act's rules in staffing the federal courts, that is, the Federal Court of Canada and the Supreme Court of Canada. In fact, appointments to the federal courts are made by the Governor in Council; an appointee must either be a judge of a superior, district, or county court in Canada or be a member of at least ten years' standing of a provincial bar; the salaries of all the federal judges are "fixed and provided" by the same federal statute that fixes and provides the salaries of the section-96 judges. But because the sections of the BNA Act that relate to the administration of justice are inapplicable to the federal courts, the important practical consequence follows that the federal Parliament is not under any constitutional restraint in assigning jurisdiction to inferior courts or administrative tribunals. Such bodies may be invested with functions traditionally exercised by a superior, district, or county court if the federal Parliament so enacts.[22] Nor is there any doubt about the validity in federal statutes of privative clauses (that is, clauses that purport to restrict judicial review of the decisions of administrative tribunals).[23] In these respects the federal Parliament has larger powers than have the provincial Legislatures.

Criminal Justice

Criminal law power

Canada differs from the federal systems of the United States and Australia in assigning the enactment of criminal law to the federal Parliament. Section 91(27) of the BNA Act confers on the federal Parliament the power to make laws in relation to "the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters." This power authorizes the federal Parliament to enact the substantive[24] criminal law and criminal procedure. The power has been interpreted as extending far beyond traditional criminal law. Laws relating to religious observance have been held to be criminal,[25] and it is possible that all laws relating to religion are within the criminal law power.[26] A similar line of reasoning holds that laws relating to speech are also within the criminal law power.[27] Competition law has been upheld under the criminal law power,[28] as have various other forms of economic regulation.[29] The topics of religion, speech, civil liberties, competition law, and economic regulation fall outside the scope of this paper, but it is important to recognize that on any re-allocation of power over criminal law, it would be necessary to deal with those topics: to decide whether they should be re-allocated along with traditional criminal law and, if not, to find appropriate language to sever them from that law.

Although criminal law is under the authority of the federal Parliament, the provinces also have a power to enact penal laws. Under section 92(15) the provinces may impose "punishment by fine, penalty or imprisonment" for the purpose of enforcing otherwise valid[30] provincial laws. It is sometimes difficult to distinguish between a valid provincial law with an ancillary penalty and a provincial law that is invalid because it is, in pith and substance, a 'criminal law'.[31]

In addition the provinces have the power to establish courts of criminal jurisdiction. While the federal power over the criminal law in section 91(27) expressly includes "the procedure in criminal matters," it expressly excludes "the constitution of courts of criminal jurisdiction." This latter power (that is, the power over the administration of justice in the provinces that expressly refers to the establishment of courts of criminal jurisdiction) is a provincial responsibility under section 92(14).

Policing

The policing of criminal law is also within provincial authority under section 92(14). Each province has the power to establish its own police force in order to police both provincial penal laws, which may be enacted under section 92(15), and the federal Criminal Code. In point of fact, eight of the ten provinces, that is, all except Ontario and Quebec, have entered into contracts with the federal government under which "provincial police services" are provided, for a fee calculated as a percentage of the cost of the services, by the Royal Canadian Mounted Police (R.C.M.P.)[32] Provincial police services are defined as "the enforcement of the [federal] Criminal Code, provincial statutes and municipal by-laws." Since these contracts do not cover the provision of police services in municipalities above a population of 1500, some of the larger municipalities in the eight provinces under contract have their own police forces which, of course, are established under provincial law. But in nearly two hundred municipalities the R.C.M.P. also serves as the municipal police force, performing 'municipal police services', which have the same definition as 'provincial police services', under contracts between the municipality and the federal government.

Ontario and Quebec have not entered into policing contracts with the federal government. Each of those two provinces has established a provincial police force to police its non-municipal areas. Policing in municipal areas is provided either by a municipal police force or by the provincial force.[33]

The policing contracts that have been adopted by the eight contracting provinces and by the nearly two hundred contracting municipalities are authorized on the federal side by section 20 of the Royal Canadian Mounted Police Act[34] and on the provincial side by a provision in the provincial Police Act.[35] This means that in performing 'provincial police services' and 'municipal police services' under contract, the R.C.M.P. is authorized by the statute law of a province, as well as by federal statute law. The constitutional authority for this aspect of R.C.M.P. policing can be traced back through the provincial Police Act to section 92(14), the provincial power over the administration of justice in the province.

The North West Mounted Police, predecessor of the Royal Canadian Mounted Police, was originally formed to police the federal territories; the R.C.M.P. is still the sole police force in the remaining territories, that is, the Yukon Territory and the Northwest Territories. The constitutional authority for this function is to be found in the federal Parliament's plenary powers of government over the federal territories, which are conferred by section 4 of the BNA Act of 1871.[36]

The R.C.M.P. also conducts Canada's Security Service, investigating subversive activities or espionage in all provinces, including Ontario and Quebec, as well as activities outside Canada that are directed against Canada. Such activities are usually offences under the Official Secrets Act, although they may often be Criminal Code offences as well. The Security Service is established on the constitutional basis that national security is a federal responsibility, either under the peace, order, and good government power[37] of section 91 or under the defence power of section 91(7). It seems clear from the *Keable* decision that the R.C.M.P. has the constitutional authority to police matters of national security.[38]

In all provinces, including Ontario and Quebec, which have their own provincial police forces, the R.C.M.P. polices federal statutes other than the Criminal Code, and federal prosecutors undertake the prosecutions entailed. Some of the federal statutes that are federally policed and prosecuted are 'criminal' laws in that, like the Criminal Code, they have been enacted under the criminal law power of the federal Parliament. These include, for example, the Combines Investigation Act, the Lord's Day Act, and the Hazardous Products Act. In addition, even in areas policed by provincial or municipal forces, a few Criminal Code offences are policed by the R.C.M.P. One of these is conspiracy to commit an offence under a statute other than the Criminal Code; the offence of conspiracy is a Criminal Code offence even when the conspiracy is to violate another federal statute. Other examples are fraud or theft against a federal government department, counterfeiting, and a variety of 'white-collar' offences such as stock frauds and bankruptcy frauds.[39] The constitutional authority for the federal policing of offences created by the Criminal Code and other statutes enacted under the criminal law power is not entirely clear. It depends on the same considerations as apply to federal prosecutions of offences created by the Criminal Code and other statutes enacted under the criminal law power. The constitutional authority for such prosecutions is examined in the next section of this paper, and the conclusion is reached that the criminal law power probably provides the necessary constitutional authority. The same conclusion would follow with respect to federal policing.

The paragraph above dealt with statutes enacted by the federal Parliament under the criminal law power. There are, of course, many statutes enacted by the federal Parliament under powers other than the criminal law power that contain penal provisions for their enforcement. These include, among many others, the Income Tax Act, the Customs Act, the Excise Act, the Fisheries Act, and the Post Office Act. These statutes are also policed by the R.C.M.P. The constitutional authority for the federal prosecution of offences created by federal statutes enacted under federal powers other than the criminal law power has been upheld by the Supreme Court of Canada in *The Queen* v. *Hauser*,[40] a case that is discussed in the next section of this paper. The authority is provided by whatever head of power authorized the enactment of the offence that is being prosecuted. The same authority would extend to the policing of any such offence.

Prosecution

Prosecutions of offences under the federal Criminal Code, as well as under provincial penal statutes, are undertaken by prosecutors who in each province are appointed and paid by the provincial government, and who come within the responsibility of the provincial Attorney General. There are no contracts for the provision of federal prosecutorial services, like the contracts under which the R.C.M.P. performs police functions in so many provinces and municipalities; even in those provinces and municipalities with R.C.M.P. contracts, Criminal Code prosecutions are undertaken by provincial Crown attorneys or Crown prosecutors. Obviously this is also the situation in those provinces and municipalities with their own police forces. The constitutional authority for provincial prosecution of federal criminal law stems from a province's power over its own administration of justice.[41]

Prosecutions of offences under federal statutes other than the Criminal Code, as well as the offence of conspiracy to commit such an offence, are undertaken by federal prosecutors, that is, counsel employed by the federal Department of Justice. Since 1969 the constitutional authority for federal prosecutions has become controversial. Before that date the division of function between provincial prosecutors and federal prosecutors seems to have rested entirely on informal agreement between the federal and provincial governments, and the matter seems to have been uncontroversial. In 1969 the division of function was reflected for the first time in an amendment to the Criminal Code.[42] Before 1969 the Criminal Code defined the term 'Attorney General' as the Attorney General of each province. The 1969 amendment altered the definition so that, in respect of offences under statutes other than the Criminal Code or conspiracies to commit such offences, the term meant 'the Attorney General of Canada'. This amendment, in effect, formally substituted the federal Attorney General for the provincial Attorney General in respect of the stipulated classes of offences. It was, therefore, an explicit assertion of federal legislative authority over the prosecutorial function. It squarely raised the constitutional issue of whether the federal Parliament had the authority to legislate concerning the prosecution of offences under federal statutes.

The constitutional issue was litigated in a number of cases involving drug offences. The two most important cases were *Regina* v. *Pelletier* (1974)[43] and *The Queen* v. *Hauser* (1979).[44] In

Pelletier the Ontario Court of Appeal upheld the 1969 amendment, holding that the prosecution of a charge of conspiring to violate the Narcotic Control Act was properly instituted by a federal prosecutor. The Supreme Court of Canada refused leave to appeal this decision.[45] In *Hauser* the Alberta Appellate Division held that the 1969 amendment was unconstitutional, and that there was no federal power to prosecute a charge of violating the Narcotic Control Act. This decision was appealed to the Supreme Court of Canada. The Supreme Court of Canada reversed the decision of the Alberta Appellate Division, but it did so on a narrow ground. A majority of the seven-judge bench held that the Narcotic Control Act was not a "criminal law strictly so called"[46] in that it was not authorized by the federal criminal law power in section 91(27) of the BNA Act, but by the federal power over the "peace, order, and good government of Canada" in the opening words of section 91 of that Act. On this view the case did not raise the question of whether there was federal power to prosecute offences under 'criminal' laws; it only raised the question of whether there was federal power to prosecute offences under 'non-criminal' laws. The majority opinion held that there was federal power to enforce prosecution of offences under non-criminal laws, and that the power extended to the prosecution of offences under the Narcotic Control Act.[47]

The ruling in the case of *The Queen* v. *Hauser* affirms the existence of federal legislative authority over the prosecution of offences under federal laws enacted under a power other than the criminal law power. But it leaves open the question of whether there is federal legislative authority over the prosecution of offences under federal laws enacted under the criminal law power. The court has not explained why there should be any difference between the power of enforcement of the two classes of federal statutes.[48] It is not sufficient to point out that the provincial power over the administration of justice in section 92(14) includes the enforcement of criminal law because section 92(14) includes the enforcement of non-criminal law as well. Indeed, section 92(14) explicitly includes "civil procedure," yet the law is clear that the federal Parliament can stipulate the procedure in provincial courts for civil causes within federal jurisdiction, and it has done so in cases of divorce and bankruptcy, for example.[49] The procedure for federal civil causes of action thus has a double aspect. It comes within provincial power under section 92(14) so that if federal law is silent, the provincial legislature can stipulate the court and the procedure.[50] But there is also concurrent power flowing from whatever head of federal legislative authority justified the creation of the federal cause of action.[51] If this is the constitutional position with respect to civil causes of action — and that it is so is not controversial — it is hard to see why the constitutional position with respect to criminal offences should be any different. The provinces have the power to prosecute federal offences by virtue of section 92(14). But there is also concurrent federal power flowing from whatever head of federal legislative authority justified the creation of the federal offence. If this reasoning is sound, then there is no reason to draw any distinction between the prosecution of federal criminal laws and the prosecution of federal non-criminal laws: the federal authority exists in both cases.

In *Proprietary Articles Trade Association* [P.A.T.A.] v. *Attorney General of Canada* (1931),[52] the Privy Council upheld the validity of the Combines Investigation Act, a federal statute that prohibited combinations in restraint of trade and subjected them to criminal penalty. In addition the Act established a registrar and commissioners, conferred on them the duty to investigate breaches of the Act, and armed them with powers to summon witnesses and compel the production of documents. Any recommendation for a prosecution was to be made to the Attorney General of a province, and if no action was taken by him, the Solicitor General of Canada could begin a prosecution; private prosecutions were prohibited. The Privy Council upheld the Act as an exercise of the federal Parliament's authority over criminal law. This upholding of the Act's validity expressly included the extensive assertion of power over the investigation and the prosecution of offences under the Act.[53]

The P.A.T.A. case appears to be an indisputable confirmation of federal legislative authority over the prosecution of criminal laws. It may be inferred from the majority reasoning in *Hauser* that the current members of the Supreme Court of Canada do not see the decision as finally resolving the question. The decision could be overruled as wrong on this point, but this would be an extreme step in relation to a decision that has stood for so long without question of its correctness. The decision could be distinguished on the basis that the legislation did not expressly deny to the provincial Attorney General ultimate control over any prosecution commenced by the federal Solicitor General, but it seems implausible that the legislation did leave intact the prerogatives of the provincial Attorney General once a prosecution had been commenced by the federal Solicitor General. The decision could be 'explained' on the basis that the Combines Investigation Act was enacted under the trade-and-commerce power, but this would constitute a major revision of the history of combines law. It will be recalled that in the *Board of Commerce* case,[54] the more ambitious combines law of 1919 was held to be invalid, and only by redrafting the law in 1923 as a purely criminal law was the legislation able to be sustained.[55] The law could easily have been enacted as an amendment to the Criminal Code; indeed various versions of the Act have been enacted as part of this Code.[56]

It is fair to conclude that the weight of legal authority is in favour of the federal Parliament having the power, concurrent with the provinces, to provide for the prosecution of criminal law. As a matter of policy, however, it may be objected that the existence of concurrent federal power over criminal prosecutions would enable the federal Parliament to oust the provinces completely from their longstanding prosecutorial functions. This is true because the doctrine of paramountcy would resolve any conflict in favour of the federal power. But the chance of the federal government taking over the prosecution of all Criminal Code offences without the consent of the provinces may be confidently rated at zero.

The risk that the federal Parliament may take over all Criminal Code prosecutions must be balanced against any risks that would flow from a complete denial of federal power over criminal prosecutions. Of course, even if the federal Parliament lacked the legislative power to provide for the enforcement of its criminal laws, the federal government could still prosecute offences in the same way as a private individual, subject to the overriding control of a provincial Attorney General. However, that overriding control would subject any federal prosecutions to the policy of the provincial government. Moreover the absence of federal legislative power to provide for the enforcement of criminal laws would presumably preclude all federal policing of criminal laws in the provinces, except perhaps where national security was involved.

If the federal Parliament lacked the power to provide for the enforcement of its criminal laws, there is surely a risk that some federal laws would be made useless by inadequate or ineffective or even non-existent provincial enforcement. That risk is slight in the case of the traditional Criminal Code offences against persons and property, where the provinces have a powerful interest in effective enforcement to preserve law and order. But the risk is surely a real one in the case of laws that are more controversial. A good example is the Combines Investigation Act. The effectiveness of this Act — indeed of any anti-trust law — depends on the policies and resources that are applied to its implementation. If its implementation were the ultimate responsibility of ten provincial governments of different political persuasions, it is hard to believe that a national competition policy could be effective. The risk of inadequate provincial enforcement is surely also real in the case of a law that is uncontroversial, but that requires massive resources or highly sophisticated enforcement techniques. A sophisticated crime such as counterfeiting or computer fraud might be outside the competence of a small provincial or municipal police force. An organized crime, such as one carried out by a network operating in various parts of Canada, as well as outside Canada, would be impossible to handle on a provincial basis unless there was very smooth co-operation between several forces. These hypotheses are more relevant to policing than to prosecution, but they emphasize that there should be a federal power to enforce criminal laws — as well as other kinds of federal laws — as a protection against ineffective enforcement by provincial authorities. Without the power of enforcement, the enactment of the law might turn out to have been in vain.

The constitutional authority for federal enforcement by police and prosecutors of federally enacted criminal laws cannot be asserted with complete confidence in light of the court's finessing of the issue in *Hauser*. But it will undoubtedly have to be determined soon. Probably, for the reasons given, federal power will be sustained. Of course the existence of provincial power under section 92(14) is not in doubt.[57] The federal power would be concurrent with provincial power.

Corrections

Jurisdiction over corrections, that is, the punishment of offenders, is divided between the two levels of government. The federal Parliament's power over the criminal law, conferred by section 91(27), includes the power to prescribe the punishment for breaches of that law. In addition section 91(28) gives to the federal Parliament jurisdiction over "the establishment, maintenance and management of penitentiaries." The provincial Legislatures have the power under section 92(15) to prescribe the punishment for breaches of provincial statutes. They also have in section 92(14) the power described earlier over the administration of justice; this includes the constitution, maintenance, and organization of the criminal courts. Finally, under section 92(6), the provincial Legislatures have power over the "establishment, maintenance and management of public and reformatory prisons in and for the province."

It will be observed that the federal Parliament has jurisdiction over 'penitentiaries' under section 91(28), while the provincial Legislatures have, under section 92(6), jurisdiction over 'prisons'. The distinction that is made by the Criminal Code,[58] and that is maintained in practice, is that offenders who are sentenced to imprisonment for two years or more are confined in a federal institution, that is, a penitentiary; those sentenced to less than two years are confined in a provincial institution, that is, a prison. While there is nothing in the BNA Act to indicate the distinction between penitentiaries and prisons, since neither term is defined, the 'two-year rule' is supported by pre-Confederation legislative history: in the United Province of Canada, a 'penitentiary' meant a place of confinement for those sentenced to two or more years of imprisonment; lesser offenders were confined in local jails.[59]

Needless to say, the great majority of inmates in both provincial prisons and federal penitentiaries would have been convicted of offences under the Criminal Code or other federal law. Under section 92(15) provincial laws can — and many do — provide for imprisonment as a punishment for committing an offence against provincial law. But provincial offences tend to be less serious than the major Criminal Code offences so that a fine is the sanction most commonly imposed for breach of a provincial law. It is presumably possible for a conviction under provincial law to lead to a sentence in a federal penitentiary, but it is unusual for a provincial statute to authorize a sentence as long as two years and very unusual for such a sentence actually to be imposed.

An interesting question is whether the federal power over criminal law will extend into the provincial prison system. Could a federal criminal law make stipulations about the treatment of offenders in provincial prisons? For example, the federal Parliament has enacted the Prisons and Reformatories Act,[60] and that Act provides, among other things, for the separate custody of juvenile offenders in provincial institutions. While a law of this kind could be held invalid as a law in relation to provincial prisons, it is arguable that the power to punish by imprisonment carries with it the power to define the nature of the imprisonment, even though that involves the federal imposition of minimum national standards on the provincial prison systems.

Parole is another case that falls close to the borderline between criminal law and prisons or penitentiaries. Parole involves the release of a prisoner before the expiry of his sentence so as to enable him to serve the balance of the sentence at large, but subject to conditions and under supervision. Parole is an institution that did not exist in 1867 so that the BNA Act is silent on the division of responsibility for it. What has happened is that the federal Parliament has assumed responsibility for all prisoners sentenced for an offence against federal legislation whether the prisoner is confined in a federal institution (because of a sentence of two or more years) or a provincial institution (because of a sentence of less than two years); the federal Parliament has established the National Parole Board to carry out this function.[61] The provinces have responsibility for all persons sentenced for an offence against provincial legislation, regardless of the length of the sentence or place of confinement; several, but not all, provinces have established parole boards to carry out this function.[62]

The division of responsibility over parole assumes that jurisdiction should follow the jurisdiction that prescribes the punishment. It does seem plausible to subsume the authority to remit punishment under the authority to impose punishment. Indeed this was so held in *Regina* v. *P.D.P.* (1979),[63] where the British Columbia Court of Appeal decided that the Province of British Columbia could not make legislative provision for the remission of sentences served in provincial institutions when the sentences had been imposed under the federal Juvenile Delinquents Act. This case did not concern parole, but a very similar procedure called 'conditional release'.

In corrections' theory parole is not regarded as a remission of the sentence of the paroled prisoner, but as a continuation of his sentence. A well known aphorism has it that the prisoner is at large, but he is not free. All that has changed are the conditions of his custody, and those changes have been made in order to accomplish correctional objectives, that is, to aid his rehabilitation and facilitate his re-entry to society. Once parole is accepted as a step in the correctional process, it would seem appropriate for responsibility to be divided along the same lines as it is for penitentiaries and prisons. At present, if a prisoner is confined in a provincial prison for violation of the Criminal Code or other federal law, the prisoner comes within provincial authority for the part of his sentence that is spent in prison; if he is then paroled, he comes within federal authority for the part of his sentence that is spent on parole. It is surely arguable that authority over parole should not depend on the law that the offender violated, but on the place of his imprisonment. Those offenders incarcerated in provincial prisons should be paroled by the province, regardless of the reason for their imprisonment.[64] The Canadian Criminology and Corrections Association has argued for this position primarily on the basis of the 'continuity' of each inmate's correctional program.[65] The Association adds: "This arrangement would have the further advantage of bringing the decision-making responsibility related to parole closer to the inmate in the provincial institution, and closer to the staff who know him. Supervision can be carried out by provincial staff. Also, community facilities could be incorporated in planning more easily."[66]

Probation is similar to parole in that a convicted offender is at large subject to conditions and under supervision. It differs from parole in two important respects. First, probation is ordered by the sentencing court, not by a parole board. Secondly probation is ordered in lieu of imprisonment or other punishment; it does not follow a period of imprisonment. Since probation is a form of punishment, the court's power to impose it stems from the jurisdiction that enacted the law that was violated. Thus only the federal Parliament could empower a court to impose probation for breach of a federal law,[67] and only a provincial Legislature could empower a court to impose probation for breach of a provincial law.[68]

Once probation has been ordered, however, which level of government is responsible for its administration? The BNA Act does not tell us, presumably because probation, like parole, was unknown in 1867. Nor do there appear to be any judicial decisions on the point. The current practice seems to stem from the language of the Criminal Code, which stipulates that an offender placed on probation must "report to and be under the supervision of a probation officer or other person designated by the court."[69] Thus the appointment of the supervisory official is the responsibility of the court, and the over-all supervision of probation is also entrusted to the court by the Criminal Code.[70] In this way probation has come to be viewed as part of the provincial court system: all probation services, like other provincial court services, are supplied by the provinces.[71]

The provincial responsibility for probation contrasts awkwardly with the federal responsibility for parole of Criminal Code offenders since parole and probation are so similar. On the other hand, as long as the provinces continue to be responsible for the custody of offenders sentenced to less than two years' imprisonment, it is arguable that they should be responsible for the control of offenders sentenced to the lesser punishment of probation. On this reasoning it is parole that is the anomaly. If the parole function followed the custodial function so that the provinces were responsible for paroling offenders sentenced to less than two years' imprisonment, then the division of responsibilities, although arbitrary because it would still turn on the arbitrary two-year rule, would be consistent.[72]

Revised Federalism

Jurisdiction of Provincial and Federal Courts

There would, I believe, be very little support for the thoroughgoing federalization of the court systems. The idea of a provincial court system confined to 'provincial' questions and a federal court system confined to 'federal' questions is to make "a fetish of federalism."[73] To choose the appropriate forum for each case would often be difficult and would generate much unproductive litigation; this, in turn, would cause grave uncertainties and delays in the disposition of the real issues between the parties. In cases presenting both 'provincial' and 'federal' issues, two sets of proceedings might be necessary to resolve what is essentially one controversy, and there would be no guarantee that the decision reached in one court would be compatible with the decision reached in the other. In the United States, despite the fact that the court systems are not strictly federalized, the long-standing and well developed system of federal courts, existing side by side with the state systems, provides abundant illustrations of these problems, and a huge body of jurisprudence has developed around the issues of 'federal jurisdiction'.[74]

In Canada these problems did not exist at first because of the plenary jurisdiction of the provincial courts and the absence of any federal courts; and even after the establishment of the

Exchequer Court in 1875, the narrow and specialized jurisdiction of that court minimized the possibilities of jurisdictional conflict. The jurisdiction of the Exchequer Court steadily expanded, however, culminating in 1971 in the creating of the Federal Court of Canada with fairly extensive civil jurisdiction; the latter has started to generate the same set of problems that the Americans have been struggling with for so long. For example, in some cases a suit falls within the statutory jurisdiction of the Federal Court, but is held to be within provincial jurisdiction, nonetheless, because the cause of action is not governed by 'federal' law.[75] In other cases proceedings must be brought in the Federal Court against one party and in the provincial court against another party.[76] In still other cases a third-party claim or counterclaim must be brought in a different court from the main action.[77] At the time of writing, the problems of federal jurisdiction are arising in a very large number of reported cases. It is not easy to ascertain what are the advantages that compensate for the increased cost and complexity of litigation in which the competing claims of rival jurisdictions often have to be resolved before the merits of a case can be reached, and in which the resolution often involves multiple litigation. The only practical way to reduce the number of these jurisdictional questions is to reverse the historical process and limit the jurisdiction of the Federal Court of Canada.

Criminal Justice

Criminal law power

Canadians have become accustomed to federal jurisdiction over criminal law, and only one writer has recommended that criminal law be assigned to the provinces.[78] He points to the federal systems of the United States and Australia to support the assertion that "Canada is out of step with the world,"[79] and asserts that the rules of the criminal law should vary from province to province in recognition of local conditions and sentiments.

The idea that criminal law should be transferred to the provinces is certainly practical since variations from province to province would not have deleterious effects on the national economy. However, a criminal law that varies from province to province has implications for civil liberties. The freedoms of religion, speech, and assembly depend on restraint in the exercise of criminal law, and the right to due process depends on a scrupulous code of criminal procedure. Without entering the inconclusive debate as to whether civil liberties are more at risk in provincial than in federal hands, it must be pointed out that since 1960 federal laws have been subject to the Canadian Bill of Rights. Provincial laws are not, although Alberta, Quebec, and Saskatchewan have enacted bills of rights applicable to their own laws. The analogy with the United States is not complete since it fails to take account of the pervasive influence of the American Bill of Rights that essentially creates a set of minimum standards to which state laws have to conform. The Australian analogy is more apt since state power over criminal law is not there restrained by a bill of rights. On the whole the better view is that a transfer of criminal law power to the provinces should go hand in hand with the entrenchment of a bill of rights applicable to provincial, as well as to federal, laws. At the time of writing, a bill of rights that would be applicable to provincial, as well as federal, laws has been prepared by the federal government, along with measures for the 'patriation' of the BNA Act. It may be, therefore, that a bill of rights will soon be an accomplished fact.

A technical problem associated with any relocation of the criminal law power is the need for careful redefinition of that power. No one would suggest, for example, that competition law should become a provincial responsibility. Yet competition law is deemed to be a matter coming within the criminal law power. National standards of honesty in advertising and labelling, and health or safety in product design or composition would also probably continue to be federal, although these are now matters coming within the criminal law power. Laws relating to religion, speech, or assembly are best controlled by a bill of rights, but in the absence of such a bill, consideration would have to be given to retaining federal power over those fundamental freedoms.

It is quite likely that if criminal law became a provincial responsibility, its enforcement in the area of the major crimes against persons or property — murder, rape, assault, theft, fraud, and the like — would undergo little change; but the enforcement of criminal law in the area of offences relating to cattle branding and lobster fishing, for instance, could be expected to develop distinctively. In point of fact, however, the provinces already have ample power to enact penal laws to regulate matters within their jurisdiction: for example, highway traffic. They are even free to stipulate stricter standards of conduct than that already forbidden by the Criminal Code.[80] In addition provincial enforcement of federal criminal law makes room for local conditions and sentiments, if they are not reflected in the substantive law,[81] to be influential in its enforcement by police and prosecutors. These considerations probably explain the long-standing and widespread acceptance by Canadians of a federal criminal law.

Policing and prosecution

Assuming that the enactment of criminal law and procedure remains a federal responsibility, there are three possible ways to allocate responsibility over enforcement, that is, over policing and prosecution: (1) enforcement could be the exclusive responsibility of the federal government; (2) enforcement could be the exclusive responsibility of the provincial government; (3) enforcement could be the concurrent responsibility of both levels of government.

The present uncertain state of the law has already been discussed, as well as the policy issues that bear on the decision.[82] The opinion has been expressed that the third possibility, that is, concurrent authority, is probably the present state of the law, although it is possible that the Supreme Court of Canada will hold that the second possibility, that is, exclusive provincial authority, is the position. It is perfectly clear that the first possibility, that is, exclusive federal authority, is not the law at present.[83] Moreover no one has seriously argued as a matter of policy[84] that criminal law should be enforced exclusively by the federal government: the centralized enforcement of criminal law departs from the long-standing practice of provincial enforcement; it could lead to national policies of enforcement that would be insensitive to local sensibilities or inappropriate to local conditions. Indeed, as has been noted above, the widespread Canadian acceptance of a national criminal law, in contrast to the state criminal laws of Australia and the United States, is probably explained by the long tradition of provincial enforcement adapting the law-in-operation to provincial or local sentiments.

In a revised federalism where criminal law and procedure remain a federal responsibility, the only realistic choices for enforcement authority are that it should be either exclusively provincial or concurrently provincial and federal. The former alternative has the advantage of securing the continued provincial authority of enforcement without any risk of a federal 'take-over'; but it has the disadvantage that the federal government could not guarantee the enforcement of the criminal statutes that it enacted. The latter alternative has the advantage of enabling the federal government to enforce laws that might otherwise be made ineffectual by inadequate or unwilling provincial enforcement, but it has the disadvantage of authorizing the federal Parliament to exclude the provinces altogether from the field of criminal law enforcement. Needless to say, reasonable people will give various weights to these advantages and disadvantages. For my part, I prefer the alternative of concurrent authority because it seems to me (1) that there is a real risk of inadequate provincial enforcement of criminal laws with national policy implications (for example, anti-trust laws) or laws directed against broadly based criminal organizations or conspiracies, or laws directed against highly sophisticated criminals such as counterfeiters or fraudulent computer experts;[85] (2) that there is no real risk of a federal 'take-over' of the whole field of criminal law enforcement;[86] and (3) that an appropriate division of functions can be worked out from time to time by agreement between the two levels of government.

The history of criminal law enforcement in Canada supports the view that both levels of government should be involved in the enforcement of criminal law, and that they are perfectly capable of reaching mutually satisfactory arrangements to that end. It must be remembered that no fewer than eight provinces have chosen to 'rent' the services of the Royal Canadian Mounted Police instead of establishing their own police forces. It must also be remembered that before 1969 no fewer than ten provinces agreed to — or at least acquiesced in — the federal policing and prosecution of criminal offences under statutes other than the Criminal Code and of some offences under that Code. The currently fashionable claim for exclusive provincial enforcement of criminal law does not sit easily with the actual behaviour of the provinces over the years; that behaviour has always recognized that both levels of government have a role to play in the enforcement of criminal law.

If it is realistic to recognize that in a revised federal system both levels of government will have a role to play in the enforcement of criminal law, the question still remains: How should their respective roles be reflected in the constitution? It would be possible, of course, to parcel out authority in terms of particular kinds of offences and particular stages in the enforcement process, but such an exercise could not produce a scheme of sufficiently enduring utility to be appropriate as part of a constitution. The alternative of exclusive provincial authority would not necessarily preclude some continuing federal involvement by the permission of provincial governments or by their delegation. But, surely, concurrent authority would best reflect the dual occupation of the field of enforcement, with the actual division of responsibilities being agreed upon from time to time by the eleven governments through the usual mechanisms of federal-provincial co-operation.

Corrections

In a revised federalism there are many possible ways of allocating jurisdiction over corrections: (1) the entire field could be a federal responsibility; (2) the entire field could be a provincial responsibility; (3) the entire field could be a concurrent responsibility; (4) some corrections functions could be federal and others provincial; and (5) the *status quo*, under which some functions are split along an arbitrary dividing line — for example, the two-year rule — could be maintained. In order to choose among these various possibilities, one has to answer certain basic questions. Is the administration of corrections a sufficiently distinct and integrated government function that it is appropriate to treat it as a single 'matter' or constitutional value for the purpose of distributing legislative power? If so, is the matter so closely connected with criminal law and procedure that it should be federal, assuming that criminal law and procedure remain federal? Or is the matter more closely connected with the administration of justice so that it should be provincial? Or should the matter be provincial because of its affinity to the provision of social services? If the administration of corrections is not a single integrated topic, should it be divided into its constituent parts, and should those parts be allocated in accordance with their connection to criminal law, the administration of justice, or the provision of social services?

In distributing power over corrections, much depends on the purpose of each function of correction. Criminologists and other experts, however, do not agree on correctional purposes, and dominant theories and techniques change in relatively short periods of time. Indeed, over the years, there have been various recommendations for changing the present distribution of authority over corrections. The Archambault *Report* (1938)[87] was written at a time when the idea of rehabilitation as the main goal of corrections was just becoming accepted in North America. This *Report* argued that rehabilitation was best achieved in a centralized system that could apply a single set of 'scientific principles'. In addition the *Report* argued that a unified administration would ensure comparable custodial standards throughout the country and would produce savings in costs. The *Report* accordingly recommended that corrections be centralized so that the responsibility would become almost entirely federal. The Fauteux *Report* (1966),[88] which embraced rehabilitation even more wholeheartedly than the Archambault *Report*, also favoured centralization, advocating that the two-year rule become a six-month rule. The Ouimet *Report* (1969)[89] was sceptical about rehabilitation as a universal goal of corrections and about the workability of a centralized system of corrections. It favoured the preservation of the two-year rule, but with anomalies removed so that each jurisdiction would control a full range of services including parole. The federal Law Reform Commission of Canada[90] virtually abandoned rehabilitation as a goal of corrections and urged a substantial reduction in prison populations, but it did not make any recommendations for changing the present division of jurisdiction.[91] These different reports emphasize the difficulty of making enduring proposals for constitutional change in the area of corrections. All that will be attempted here is an outline of what seem to me to be the principal lines of argument.

One way of looking at the matter of corrections is to regard it as having its closest affinity to criminal law and procedure that are now within federal jurisdiction. On this basis, as long as the federal Parliament retains responsibility for criminal law and procedure, it would be appropriate for the federal Parliament to have authority over corrections, too.

A second way of looking at the matter of corrections is to regard it as having its closest affinity to the administration of justice. The analogy here would be the police, the prosecutors, and the courts. Through the various stages of the administration of criminal justice, the police, the prosecutors, and the courts are able to adapt the letter of the criminal law to local conditions and sentiments. A similar argument is applicable to corrections. The conditions of custody, the suitability of an inmate for parole, the conditions to be observed on parole or on probation, the use of community institutions, should all be illumined by a close knowledge of the environment from which the offender came and into which he will return. Moreover, in a provincial system, the offender is likely to be imprisoned fairly close to his home so that links with family and friends may be better preserved. By the same token, however, a smaller prison system would be less able to provide specialized facilities appropriate to particular kinds of offenders.

A third way of looking at the matter of corrections is to emphasize its rehabilitative function. On this basis the link with criminal law and criminal justice is weaker than the link with social services such as education, health care, and income support. The argument would be that since other social services are predominantly supplied by the provinces, correctional services should be, too. Of course the Archambault and Fauteux *Reports* did not conclude that rehabilitation would be best achieved by the provinces, but preferred a unitary system. It is worth noting, too, that there is a substantial federal presence in the health-care and income-support fields through the shared-cost programs of hospital insurance, medicare, and Canada assistance, as well as direct federal programs such as unemployment insurance, old age pensions, Canada Pension Plan, and family allowances. These programs are designed to ensure that all Canadians will receive certain minimum standards of social services. Obviously a similar concern about standards is appropriate in the field of corrections, where the smaller provinces would be less able to finance a system than the larger ones.

If correctional services were federal, one could expect the normal advantages of a centralized system; that is to say, the services would pursue consistent national policies and conform to national standards. A larger system, too, is able to provide a wider range of specialized facilities and generally enjoy the advantages of a large budget.

If correctional services were provincial, one could expect better liaison with local communities and facilities and better adaptation to local conditions and sentiments. On the other hand, one could also expect different goals to be emphasized by different systems and a range of standards from excellent to downright poor, depending on the resources allocated to corrections in each province. There is no simple answer to the problem of standards. They would not be easy to define — or enforce — in a new entrenched bill of rights, assuming this to be a feature of a new federalism. The shared-cost program, although it has maintained minimum national standards in health and welfare, is now so widely resented, at least in provincial rhetoric, that it does not seem to be a politically feasible alternative.

In default of compelling arguments for change, one is left with the present distribution of functions that entrusts long-term prisoners to federal control and short-term prisoners to provincial control. This arrangement seems to work tolerably well if the more recent reports discussed above are to be believed. However, the division of authority is confusing to anyone who has no detailed understanding of the correctional systems, and this confusion must blur the lines of political responsibility. It is also wasteful in that it leads to duplication of facilities and services.

Special Status for Quebec

Special status for Quebec would exist if the Canadian Constitution accorded to that province larger powers or rights than it accorded to the other provinces. In the field of the administration of justice, special status could involve (1) the conferral of the power to enact criminal law and procedure on Quebec alone of the provinces; (2) different arrangements for the appointment of superior court judges in Quebec from those established for the other provinces; (3) the restriction or abolition of appeals from Quebec to the Supreme Court of Canada in cases involving Quebec's distinctive civil law and perhaps in cases involving its provincial statutes as well; (4) an increase in the complement of judges from Quebec on the Supreme Court of Canada or other final courts to facilitate the determination of civil law appeals (if they continue) and to give Quebec judges a larger vote in the outcome of federal-provincial controversies.

The first of these possibilities, that is, that Quebec alone of the provinces should have the power to enact criminal law and procedure, is a theoretical option, but not one justifying extended comment. It has never, to my knowledge, been suggested, and the field of criminal law and procedure is not one that closely engages Quebec's language and culture. It seems unlikely, therefore, that special status for Quebec would include powers over criminal law and procedure that were not shared by the other provinces. The other three possibilities are more realistic and deserve more extended comment.[92]

Sovereignty for Quebec

If Quebec were to separate from the rest of Canada and become a nation in its own right, there would be no laws or institutions common to the two nations. In the administration of justice, the following results would come about: there would be no appeals from Quebec to the Supreme Court of Canada; the Canadian government would play no role in the appointment of Quebec judges; Quebec would enact the judicial and administrative structures that it desired; and Quebec would enact and enforce its own criminal law.

A sovereign Quebec would, of course, be a unitary state with all legislative power centralized in one legislative assembly. Canada, after Quebec's separation, would, initially at least, be a federal state with nine provinces still governed by the terms of the BNA Act. It seems reasonable to assume, however, that a Canada-without-Quebec would be so different from a Canada-with-Quebec that there would soon be substantial changes in Canadian federalism. Would the country, shorn of its most distinctive part, evolve into a more centralized federal state or even into a unitary state? Or would the process of disintegration continue, with the Atlantic provinces, necessarily cut off from the rest of the country, and some of the remaining provinces joining the United States? In a study confined to the administration of justice, it does not seem profitable to speculate on these possibilities, although each would obviously entail major changes in the administration of justice.

Sovereignty-Association

Any form of economic association between Canada-without-Quebec and Quebec will entail a treaty of association between the two states, providing for some or all of the following matters: freedom of movement of people, free trade, a common tariff, and the same currency. The treaty would not extend beyond economic matters and so would not directly affect the administration of justice. Depending on the degree of association, the treaty might well establish some governmental institutions that would be common to both states. Quebec's white paper on sovereignty-association (1979) proposes, for example, a community council, a commission of experts, a court of justice, and a monetary authority. Presumably none of these community institutions would exercise significant powers directly over the people of either state. The powers of the community institutions would be over the two states, and their decisions would have no effect within each of the two states unless they were implemented by the appropriate governmental authorities of each state. The administration of justice within each state would not be directly affected by any of the community institutions, including the proposed community court. The role of that court would be confined to resolving disputes over the interpretation of the treaty of association. Its decisions would be binding on the two states, but not on individuals within the two states.[93]

Notes

1. Peter H. Russell, "Constitutional Reform of the Canadian Judiciary," *Alberta Law Review* 7 (1968), pp. 104–5.

2. A short account is available in Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977), Chapter 7. Many more detailed monographs and articles will be referred to in appropriate places throughout the study.

3. Supreme and Exchequer Court Act, S.C. 1875, c. 11.

4. *Ibid.*

5. Federal Court Act, S.C. 1970–71–72, c. 1.

6. See generally Hogg, *Constitutional Law of Canada*, pp. 116–17.

7. *Quebec North Shore Paper Co.* v. *Canadian Pacific* [1977] 2 S.C.R. 1054; *McNamara Construction* v. *The Queen* [1977] 2 S.C.R. 654; P.W. Hogg, "Comments," *Canadian Bar Review* 55 (1977), p. 550.

8. See note 3 above.

9. That is, appeals that the appellate can make directly to a higher court, by-passing a lower court.

10. See John Willis, "Securing Uniformity of Law in a Federal System," *University of Toronto Law Journal* 5 (1944), p. 352. He accounts for uniformity on the basis of the dual factors of (1) centralized decision making in the Privy Council and Supreme Court of Canada and (2) deference to the common law of England.

11. This can occur in a number of areas of federal jurisdiction, but most commonly in the diversity jurisdiction over controversies "between citizens of different states": U.S. Constitution, article III, section 2.

12. *Erie Railroad Co.* v. *Tompkins* (1938) 304 U.S. 64.

13. *Renvoi touchant la constitutionnalité de la loi concernant la jurisdiction de la cour de magistrat* [1965] S.C.R. 772.

14. Hogg, *Constitutional Law of Canada*, p. 132.

15. *Séminaire de Chicoutimi* v. *Attorney-General of Quebec* [1973] S.C.R. 681.

16. *Tomko* v. *Labour Relations Board (Nova Scotia)* [1977] 1 S.C.R. 112 at 120.

17. *Attorney-General of Quebec* v. *Farrah* (1978) 86 D.L.R. (3d) 161 (Supreme Court of Canada).

18. *Toronto* v. *York* [1938] A.C. 415; *Quance* v. *Ivey* [1950] O.R. 397 (Ontario Court of Appeal); *Toronto* v. *Olympia Edward Recreation Club* [1955] S.C.R. 454; but now see *Mississauga* v. *Peel* [1979] S.C.R. 244 (Supreme Court of Canada, March 6, 1979).

19. W.R. Lederman, "The Independence of the Judiciary," *Canadian Bar Review* 34 (1956), pp. 1139, 1172–75; J.N. Lyon, "Comments," *Canadian Bar Review* 49 (1971), p. 365; Gerald LeDain, "Sir Lyman Duff and the Constitution," *Osgoode Hall Law Journal* 12 (1974), pp. 261, 334–36.

20. H.W. Arthurs, "The Dullest Bill: Reflections on the Labour Code of British Columbia," *University of British Columbia Law Review* 9 (1974), pp. 280, 329–39; P.W. Hogg, "Is Judicial Review of Administrative Action Guaranteed by the British North America Act?" *Canadian Bar Review* 54 (1976), p. 716.

21. Hogg, *Constitutional Law of Canada*, p. 126.

22. *Papp* v. *Papp* (1970) 1 O.R. 331 (Ontario Court of Appeal).

23. *Pringle* v. *Fraser* [1972] S.C.R. 821.

24. That is, relating to the rules of right administered by a court, as opposed to forms of procedure.

25. *Attorney-General of Ontario* v. *Hamilton Street Railway* [1903] A.C. 524; *Henry Birks and Sons* v. *Montreal* [1955] S.C.R. 799.

26. See *Saumur* v. *City of Quebec* [1953] 2 S.C.R. 299.

27. This line of reasoning is seen in *Reference re Alberta Statutes* [1938] S.C.R. 100 per Cannon J.; *Switzman* v. *Elbling* [1957] S.C.R. 285 per Kerwin C.J., Locke, Cartwright, Fauteux, and Nolan J.J.

28. *Proprietary Articles Trade Association* v. *Attorney-General of Canada* [1931] A.C. 310.

29. For example, *Regina* v. *Cosman's Furniture* [1977] 1 W.W.R. 81 (Manitoba Court of Appeal) (Hazardous Products Act); but compare recent judicial restriction of the criminal law power in *The Queen* v. *Hauser* (1980) 98 D.L.R. (3d) 193 (Supreme Court of Canada) and *Labatt Breweries* v. *Attorney-General of Canada* (1980) 30 N.R. 496 (Supreme Court of Canada).

30. That is, a law that draws its validity from something other than the penal provision.

31. Compare, for example, *Bedard* v. *Dawson* [1923] S.C.R. 681 with *Switzman* v. *Elbling* [1957] S.C.R. 285.

32. The current contracts, which are standard in their terms, run from 1 April 1976 for a term of five years ending 31 March 1981. There are similar contracts with the Governments of the Yukon Territory and the Northwest Territories. At the time of writing, all these contracts are being negotiated.

33. The best account of the structure of policing in Canada is William Kelly and Nora Kelly, *Policing in Canada* (Toronto: Macmillan, 1976).

34. R.S.C. 1970, c. R–9.

35. British Columbia's Police Act, S.B.C. 1974, c. 64, s. 16; Alberta's Police Act, S.A. 1973, c. 44, s. 2; Saskatchewan's Police Act, S.S. 1973–74, c. 77, s. 3; Manitoba's Provincial Police Act, R.S.M. 1970, c. P 150, s. 15; New Brunswick's Police Act, S.N.B. 1977, c. P–9.2, s. 2; Nova Scotia's Police Act, S.N.S. 1974, c. 9, s. 12; Prince Edward Island's Police Act, R.S.P.E.I. 1974, c. P–9, s. 15; Newfoundland's Agreement for Policing the Province Act, R.S. Nfld. 1970, c. 6, s. 2.

36. R.S.C. 1970, Appendix II, No. 11.

37. These are the opening words of section 91.

38. *Attorney-General of Quebec and Keable v. Attorney-General of Canada* [1979] S.C.R. 218 per Pigeon J., with the concurrence of Martland, Ritchie, Dickson, Spence JJ., and (on this point) Pratte J., held at p. 242 that: "Parliament's authority for the establishment of this force and its management as part of the Government of Canada is unquestioned. It is therefore clear that no provincial authority may intrude into its management." This was the full discussion by Pigeon J. of the constitutional authority for the R.C.M.P. except by referring to it as "a validly established federal organization" (p. 258). With respect, these seem rather perfunctory conclusions, considering the broad range of functions performed by the R.C.M.P. — provincial police services under contract, security service, federal policing of non-Criminal Code offences, and some Criminal Code offences — and considering the differing constitutional justifications for the various functions. However, the activities of the R.C.M.P. that were under scrutiny by the Keable Commission seem to have been security-service activities, and the Supreme Court of Canada must be taken to have upheld at least this basic function of the force.

39. See Kelly and Kelly, *Policing in Canada*, pp. 63–64, 92. In addition, as noted earlier, the R.C.M.P. Security Service investigates Criminal Code offences that may have implications for national security.

40. (1980) 98 D.L.R. (3d) 193 (Supreme Court of Canada).

41. See s. 92(14), the British North America Act, 1867.

42. S.C. 1968–69, c. 38.

43. (1975) 4 O.R. (2d) 677 (Ontario Court of Appeal).

44. (1980) D.L.R. (3d) 193 (Supreme Court of Canada).

45. 11 October 1974.

46. (1980) 98 D.L.R. (3d) 193 at 204.

47. This was the reasoning of Pigeon J., with the agreement of Martland, Ritchie, and Beetz JJ. Spence J. wrote a separate concurring opinion, holding that the prosecution of violations of federal statutes was within federal legislative power irrespective of whether the statutes were criminal or not. Dickson J., with the agreement of Pratte J., dissented, holding that the Narcotic Control Act (R.S.C. 1970, c. N – 1) was a criminal law, and that while there was federal power over the prosecutions of non-criminal laws, there was no federal power over the prosecutions of criminal laws. Laskin C.J. and Estey J. did not sit on the case.

48. That there is a difference is implicit in Pigeon J.'s refusal to decide the issue of authority to enforce criminal statutes and is explicit in Dickson J.'s dissenting opinion: see note 47.

49. "It has long been decided with respect to matters coming within the enumerated heads of s. 91, the Parliament of Canada may give jurisdiction to provincial courts and regulate proceedings in such courts to the fullest extent." *Attorney-General of Alberta v. Atlas Lumber Co.* [1941] S.C.R. 87 at 100 per Rinfret, J. For full discussion, see Bora Laskin, *Canadian Constitutional Law: Cases, Text and Notes on Distribution of Legislative Power*, 4th ed. rev. (Toronto: Carswell, 1975), pp. 811 – 14.

50. *Board v. Board* [1919] A.C. 956.

51. See note 49 above.

52. [1931] A.C. 310.

53. *Ibid.*, p. 327.

54. [1922] A.C. 191.

55. In the P.A.T.A. case Lord Atkin, while resting the decision of the Privy Council exclusively on the criminal law power, did leave open the possibility that the trade-and-commerce power could also have sustained the legislation. [1931] A.C. 310 at 326.

56. The history of Canadian combines law is related in Hogg, *Constitutional Law of Canada*, pp. 281–85.

57. *Di Iorio* v. *Warden of Montreal Jail* [1978] 1 S.C.R. 152.

58. R.S.C. 1970, c. C–34, s. 659.

59. Stats. Province of Canada, 6 Vic., c. 5 (1842), s. 3. See generally K.D. Jaffary, "Correctional Federalism," *Canadian Journal of Corrections* 7 (1965): 362–76, a valuable account of the distribution of authority over corrections to which the present writer is indebted.

60. R.S.C. 1970, c. P–21; substantially amended by S.C. 1976–77, c. 53, ss. 45–46.

61. Parole Act, R.S.C. 1970, c. P–2.

62. For example, Department of Correctional Services Act, R.S.O. 1970, c. 110, ss. 26–30.

63. (1979) 94 D.L.R. (3d) 564 (British Columbia Court of Appeal).

64. Jaffary, "Correctional Federalism," pp. 362, 366–69.

65. Canadian Criminology and Corrections Association, "The Parole System in Canada," *Canadian Journal of Criminology and Corrections* 15 (1973): 144–69.

66. *Ibid.*, p. 149.

67. It has done so by the Criminal Code, R.S.C. 1970, c. C–34, s. 663.

68. Provincial statutes provide for probation; for example, Provincial Offences Act, S.O. 1979, c. 4, ss. 72–75.

69. Criminal Code, R.S.C. 1970, c. C–34, s. 663(2)(a).

70. See especially s. 664.

71. Jaffary, "Correctional Federalism," pp. 362, 369.

72. Some provinces have made arrangements with the federal government, under which the probation officers serve as parole officers as well.

73. Russell, "Constitutional Reform of the Canadian Judiciary," pp. 103, 120.

74. See generally Charles Wright, *Handbook of the Law of Federal Courts*, 2d ed. (St. Paul, Minn.: West Publishing, 1970).

75. For example, *Quebec North Shore Paper Co.* v. *Canadian Pacific* [1977] 2 S.C.R. 1054; *McNamara Construction* v. *The Queen* [1977] 2 S.C.R. 655.

76. For example, *Pacific Western Airlines* v. *The Queen* [1980] 1 F.C. 86 (F.C.A.)

77. For example, *The Queen* v. *Thomas Fuller Construction* (1980) 106 D.L.R. (3d) 193 (Supreme Court of Canada).

78. Albert S. Abel, "A Chart for a Charter," *University of New Brunswick Law Journal* 25 (1976), pp. 20, 50–52.

79. *Ibid.*, p. 50.

80. *Mann* v. *The Queen* [1966] S.C.R. 238; and for discussion see Hogg, *Constitutional Law of Canada*, pp. 104–10, 291–93.

81. See note 24 above.

82. See pages 105–9 above.

83. See note 57 above.

84. Without entering on any issue of policy, in the *Di Iorio* case (note 57), Laskin C.J. (with de Grandpré J.) dissented on the ground that the enforcement of criminal law was exclusively federal, but the other seven judges disagreed with this.

85. See p. 108 above.

86. *Ibid.*

87. Canada, Royal Commission to Investigate the Penal System of Canada, *Report* (Ottawa: Queen's Printer, 1938) (Archambault Report).

88. Canada, Committee Appointed to Inquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada, *Report* (Ottawa: Queen's Printer, 1956) (Fauteux Report).

89. Canadian Committee on Corrections, *Report: Toward Unity: Criminal Justice and Corrections* (Ottawa: Queen's Printer, 1969) (Ouimet Report).

90. Law Reform Commission of Canada, *A Report on Dispositions and Sentences in the Criminal Process: Guidelines* (Ottawa: Information Canada, 1976).

91. See generally H.G. Needham, "Historical Perspectives on the Federal-Provincial Split in Jurisdiction in Corrections," *Canadian Journal of Criminology* 22 (1980): 298 – 306.

92. These possibilities are discussed in the papers written by Professors Duplé and MacPherson.

93. The implications of such a community court are discussed in the paper written by Professor MacPherson.

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La réforme constitutionnelle et l'article 96 de l'Acte de l'Amérique du Nord britannique 1867

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La réforme constitutionnelle et l'article 96 de l'Acte de l'Amérique du Nord britannique 1867

Introduction

L'article 96 de l'Acte de l'Amérique du Nord britannique (A.A.N.B.) 1867 dispose que « Le gouverneur général nommera les juges des Cours supérieures, de district et de comté dans chaque province, sauf ceux des Cours de vérification en Nouvelle-Écosse et au Nouveau-Brunswick ».

On trouve l'origine de cette disposition dans la 33^{e} des résolutions de Québec qui établissait que « Le gouvernement fédéral nommera et paiera les juges des Cours supérieures dans les diverses provinces et des Cours de comté dans le Haut-Canada, et le Parlement déterminera leur salaire »[1].

Les 34^{e} et 35^{e} résolutions obligeaient le gouvernement fédéral à choisir les juges parmi les membres du Barreau de la province concernée, et la 37^{e} résolution garantissait la sécurité d'emploi des juges nommés par l'exécutif fédéral.

Ces résolutions deviendront les articles 96 à 100 de l'A.A.N.B. 1867, intégrés dans la partie VII de l'acte intitulée : « Le Système judiciaire », qui comprend un seul autre article, l'article 101.

Certains juges ont vu, dans les articles 96 à 100, la garantie de l'impartialité et de l'indépendance de la magistrature[2]. C'est d'ailleurs sous cet angle que, lors de la présentation des résolutions du Québec à l'Assemblée du Canada-Uni, le solliciteur général, l'honorable Langevin, envisageait la 33e résolution. Il déclara en effet que, laisser aux provinces, le pouvoir de désigner ses juges serait :

> (...) exposer les gouvernements locaux à une pression funeste exercée par le premier avocat venu ayant quelque influence dans la chambre locale. Pour se débarrasser d'un membre incommode, qui aurait à sa suite trois ou quatre partisans, on verrait un gouvernement local prendre cet incommode avocat de deuxième, troisième ou quatrième ordre pour le placer sur le banc judiciaire; tandis qu'en laissant ces nominations au parlement central, nous sommes assurés que les choix se feront parmi les hommes les mieux qualifiés, que la pression extérieure et locale sera moindre, et que le gouvernement pourra agir plus librement (...)[3].

Voir dans les articles 96 à 100 une garantie de l'indépendance et de l'impartialité des juges des cours supérieures, de district et de comté nous paraît procéder d'une vision très fragmentaire du problème de l'indépendance de la magistrature en même temps que d'une méconnaissance évidente et volontaire des principes directeurs du fédéralisme. En effet, si indépendance des juges il y a, elle n'existe qu'à l'égard des autorités provinciales mais nullement à l'égard de l'exécutif fédéral. Par ailleurs, il n'était point besoin de confier le pouvoir de nomination des juges provinciaux à l'exécutif fédéral pour garantir l'indépendance de ces juges. Cette dernière existait depuis l'union dans les colonies du Haut et du Bas-Canada ainsi qu'en Nouvelle-Écosse[4].

En Angleterre, le pouvoir de nommer les juges a toujours appartenu à l'exécutif, et l'indépendance du judiciaire a résulté de la limitation du pouvoir royal d'intervention dans le cours de la justice et dans la carrière des juges. Le *Statute of Northampton* adopté en 1328 disposait qu'aucun ordre royal ne pouvait perturber le cours de la justice rendue par les tribunaux de *common law* et que, si un tel ordre était donné, les juges devaient l'ignorer[5].

L'*Act of Settlement* adopté en 1701 enleva au souverain le pouvoir de révoquer les juges selon son bon plaisir, établit une procédure de destitution et disposa que le salaire des juges devait être « *ascertained and established* »[6]. L'indépendance du judiciaire fut renforcée par l'octroi aux juges de certains pouvoirs et privilèges qui appartenaient originairement au souverain lui-même en tant que « fontaine de justice », entre autres, le pouvoir de punir pour outrage au tribunal et l'immunité de poursuite pour tout acte accompli dans l'exercice de la fonction judiciaire.

Telle qu'elle fut réalisée en Angleterre, l'indépendance du judiciaire ne fut cependant pas transposée à la colonie. L'article 17 de l'Acte de Québec préservait soigneusement la primauté de la prérogative royale dans l'établissement des cours et la nomination des juges, laquelle était effectuée durant bon plaisir.

En 1782, le Parlement de Westminster adopta le *Colonial Leave of Absence Act* qui vint établir le pouvoir des gouverneurs de démettre certains juges de leurs fonctions pour des causes déterminées. La décision d'un gouverneur pouvait être d'ailleurs révisée par un comité du Conseil privé de Londres. Hormis ces cas, la destitution des juges restait une prérogative du souverain.

L'Acte de 1791, qui divisait l'ancienne province du Canada en Haut-Canada et Bas-Canada, prévoyait un gouvernement pour chacune des deux colonies. Les cours *supérieures* et *inférieures* devaient être établies par les assemblées législatives locales. Un des premiers pas vers l'établissement d'un système judiciaire indépendant est venu, au début du XIX^e siècle, de l'adoption par les deux colonies de lois qui rendaient les juges inéligibles aux assemblées législatives.

Les assemblées du Haut et du Bas-Canada luttèrent ardemment pour acquérir un certain contrôle sur la fonction judiciaire. Mais ce n'est qu'en 1834 que la Législature du Haut-Canada adopta une loi établissant que les juges seraient nommés durant bonne conduite, qu'ils pourraient être destitués sur adresse du Conseil législatif et de l'Assemblée, mais disposeraient alors d'un droit d'appel à Sa Majesté en Conseil[7].

Au Bas-Canada, l'indépendance du judiciaire ne sera effectivement réalisée que sous l'Union. Le Rapport Durham recommandait que l'indépendance des juges, telle qu'elle existait en Angleterre, soit étendue au Haut et au Bas-Canada dont il recommandait l'union. En 1848, l'indépendance des juges du Bas-Canada fut réalisée dans les mêmes conditions que celles qui avaient été établies dans le Haut-Canada. Parallèlement, en Nouvelle-Écosse, l'indépendance du judiciaire s'était faite de manière similaire.

Cette évolution, tant en Angleterre qu'à la Colonie, permet de constater que le pouvoir de nomination dont l'exécutif est investi n'implique pas automatiquement que les juges qui font l'objet de ces pouvoirs de nomination soient placés dans une situation de dépendance si les corollaires initiaux du pouvoir de nomination (pouvoir d'instruction, détermination du salaire et pouvoir de destitution) sont cernés par des normes qui s'imposent à l'exécutif. À cet égard, si, en 1867, le pouvoir de désigner les juges des tribunaux provinciaux avait été entièrement confié aux exécutifs provinciaux, l'indépendance et l'impartialité des juges n'auraient pas été plus mal assurées qu'elles ne le sont à l'heure actuelle si des dispositions similaires aux articles 99 et 100 étaient venues limiter le pouvoir des exécutifs provinciaux. La garantie maximale de l'indépendance du pouvoir judiciaire proviendrait de la consécration du principe par la constitution[8].

Dans cette optique, le projet de loi C-60 présenté en juin 1978 disposait, dans son article 100, que « Le principe de l'indépendance du pouvoir judiciaire, compte tenu du principe de la primauté du droit et de la suprématie de la loi, est un principe fondamental de la Constitution du Canada ». S'il est souhaitable d'introduire le principe dans la constitution, encore faudrait-il en déterminer le contenu et la portée, ce qui n'est pas aisé. Ainsi, l'indépendance des juges n'est-elle pas sujette à caution si ces derniers sont avant tout sélectionnés parmi les sympathisants du parti politique dont émane l'exécutif qui les nomme? Une réponse positive à cette question devrait alors entraîner une réflexion sur les mécanismes de choix des juges[9]. Par ailleurs, on peut s'interroger sur le contenu matériel du principe de l'indépendance de la magistrature. À titre d'exemple, on peut se demander si, lorsque l'avancement d'un juge dépend entièrement du bon vouloir d'un gouvernement, le principe n'est pas quelque peu vidé de sa signification.

Quant à la portée du principe, il apparaît souhaitable que tous les juges des tribunaux judiciaires puissent s'en prévaloir; tant ceux qui relèvent du pouvoir de nomination fédéral que ceux qui doivent être désignés par les provinces ou qui pourraient, dans le contexte d'une réforme constitutionnelle, être nommés conjointement par le fédéral et la province concernée.

L'argument selon lequel la remise du pouvoir de nomination à l'exécutif fédéral garantit la compétence des juges nommés n'est pas meilleur. L'indépendance du judiciaire peut être grandement mise en question si les justiciables n'ont aucune garantie venant les assurer que les juges seront choisis en raison de leur compétence et non pour la raison première qu'ils sont politiquement acquis au gouvernement qui les nomme. Or, l'obligation de procéder au choix des juges parmi les membres du Barreau de la province concernée, que l'on trouve mentionnée aux articles 97 et 98 de l'A.A.N.B. 1867, n'est pas réellement rassurante sur ce point.

Bien que cette justification de l'article 96 n'ait pas été avancée en ces termes lors de la discussion des résolutions de Québec à l'Assemblée du Canada-Uni, il semble que cette disposition trouve sa raison d'être dans l'instauration d'un système judiciaire dans lequel les tribunaux provinciaux étaient appelés à appliquer les lois provinciales ainsi que les lois fédérales. Certains juges appuient ce point de vue, notamment le juge Fournier de la Cour suprême. Dans *Valin* c. *Langlois*, il releva que, si les tribunaux provinciaux avaient eu pour mission exclusive d'appliquer les lois provinciales, on aurait certainement laissé entièrement entre les mains des gouvernements provinciaux le pouvoir de désigner les juges des tribunaux auxquels le fédéral n'aurait pu imposer aucun devoir[10].

Dans le contexte d'un tel système, les articles 96 et 100 auraient du même coup permis aux provinces de réaliser une économie de deniers considérable. Pour certains, cette justification des articles 96 et 100 n'est pas à minimiser[11], même si l'argument de l'économie fut présenté par l'honorable Langevin à l'Assemblée du Canada-Uni comme une « considération secondaire ».

Ainsi, l'article 96 s'inscrirait naturellement dans la logique d'un système judiciaire intégré, et c'est dans cette perspective que les propos que l'honorable Cauchon tenait devant l'Assemblée du Canada-Uni prennent tout leur relief. Pour ce dernier, en effet, la 33^{e} résolution était un élément favorisant l'unité nationale au même titre que le désaveu et la réserve, et était destinée à assurer un contrôle fédéral sur les assemblées législatives et sur les juges; il précisa que les juges provinciaux ainsi nommés n'auraient pas à servir deux maîtres à la fois mais un seul[12].

L'article 96 se révélera d'ailleurs par la suite un des piliers les plus solides de l'intégration du système judiciaire canadien, en même temps qu'il limitera considérablement la compétence législative provinciale.

Le rôle et la portée de l'article 96

Le système judiciaire canadien n'est pas intégralement unitaire. L'article 101 de l'A.A.N.B., en reconnaissant au Parlement fédéral la compétence de créer des cours additionnelles pour assurer la meilleure exécution des lois du Canada, atténuait le principe de l'unitarisme. Néanmoins, bien qu'abâtardi, l'unitarisme est prédominant dans le système judiciaire instauré en 1867, système dans lequel l'article 96 joue un rôle déterminant.

L'article 96, facteur d'intégration du système judiciaire canadien

Sous réserve de la compétence de la Cour fédérale et des dispositions dérogatoires contenues dans les lois fédérales, les tribunaux provinciaux sont appelés à appliquer les lois fédérales aussi bien que les lois provinciales.

Sur ce plan, le Canada ne se distingue guère de nombre d'États fédératifs. En effet, seuls quelques-uns d'entre eux ont choisi, à l'instar des États-Unis, d'établir un système judiciaire dualiste[13]. L'Australie s'était formellement dotée en 1901 d'un système judiciaire dont le dualisme se révéla, par la suite, plus théorique que réel. Depuis 1903, par l'effet d'une délégation du Parlement fédéral effectuée conformément à l'article 77 de la constitution de l'État fédéral, les tribunaux des États-membres appliquent aussi bien les lois fédérales que les lois locales[14].

Au Canada, les juges des tribunaux provinciaux les plus importants sont désignés par l'exécutif fédéral, conformément à l'article 96 de l'A.A.N.B. 1867. Parmi les cours visées à cet article se trouvent les *cours supérieures*, qui se caractérisent, entre autres, par le pouvoir de surveillance et de contrôle qu'elles exercent à l'égard de tous les organismes judiciaires ou quasi judiciaires constitués par les provinces, de même qu'à l'égard des corps politiques provinciaux. Le contrôle de la légalité des actes posés par ces organes provinciaux incombe de manière exclusive aux cours supérieures qui l'exercent soit par le biais des brefs de prérogative, soit par le mécanisme de l'appel devant les cours d'appel provinciales qui sont des cours supérieures au sens de l'article 96.

Une nuance doit cependant être apportée concernant le contrôle de la légalité. Une assemblée législative provinciale peut octroyer à une autorité administrative un pouvoir de révision portant sur les décisions rendues par un organe subordonné au détenteur de ce pouvoir de révision, sans pour cela contrevenir à l'article 96[15]. Par ailleurs, les assemblées législatives peuvent, à l'aide de clauses privatives, restreindre la portée du pouvoir de surveillance d'une cour supérieure en ne lui permettant pas d'examiner les décisions d'un tribunal inférieur qui, bien que rendues dans les limites de sa juridiction, sont cependant entachées d'illégalités (erreurs de droit apparentes à la face même du dossier) et qui pourraient autrement être annulées par bref de *certiorari*. Le juge Pratte précise ce point dans l'affaire *Le procureur général du Québec* c. *Farrah*[16]. Mais la majorité des juges de la Cour suprême est d'avis dans cette affaire qu'une clause privative ayant cet effet ne peut être complétée par un transfert de cette fonction de contrôle de la légalité à un organe judiciaire qui détiendrait alors une juridiction exclusive et finale sans être néanmoins composé de juges désignés conformément à l'article 96.

Quant à la fonction de contrôle portant sur la compétence même des organes judiciaires ou quasi judiciaires provinciaux, non seulement est-elle l'apanage exclusif des cours supérieures, mais les clauses privatives incluses dans les lois provinciales sont tout à fait inefficaces à évincer un tel contrôle[17].

Au Canada, le contrôle constitutionnel n'est qu'un aspect du contrôle de la légalité, la norme supérieure de référence étant alors la constitution au lieu de la loi. Le recours constitutionnel est porté devant les tribunaux ordinaires.

Dans *Séminaire de Chicoutimi et al.* c. *La Cité de Chicoutimi*, la Cour suprême a précisé qu'un tribunal inférieur pouvait, lorsque sa compétence *ratione materiae* est contestée aux stades préliminaires, se prononcer sur la constitutionnalité de la loi lui conférant compétence « puisque la compétence du tribunal est inéluctablement conditionnée par la constitutionnalité des dispositions législatives qui prétendent la lui conférer »[18]. Mais, depuis l'affaire *Farrah*, il est clair que le contrôle qu'exercent les cours supérieures quant à la compétence des organes judiciaires ou quasi judiciaires provinciaux qui ne sont pas constitués conformément à l'article 96 ne peut être évincé par une loi provinciale. De plus, dans l'affaire *Paul L'Anglais Inc. et al.* c. *Le Conseil canadien des relations du travail*[19], la Cour d'appel a argumenté que, si le Parlement fédéral avait pu validement retirer aux cours supérieures provinciales leur pouvoir de surveillance et de contrôle dans les matières de compétence fédérale pour le confier à la Cour fédérale[20], il était douteux qu'il ait la compétence d'investir cette dernière d'une telle juridiction de manière exlusive lorsque l'organisme assujetti au contrôle devait, pour exercer ses compétences, appliquer au préalable les règles de partage des compétences législatives, ce qui était le cas de l'organisme intimé, le C.C.R.T.

Le juge Bisson déclara qu'il répugnait à penser que le tribunal de droit commun qui existait au moment du pacte confédératif (en l'occurrence, la Cour supérieure du Québec) se verrait exclu aujourd'hui, par l'action unilatérale du Parlement fédéral, du contrôle portant sur les décisions d'organismes fédéraux tel le C.C.R.T., au profit d'un tribunal statutaire créé en conformité de l'article 101 de l'A.A.N.B., uniquement pour la meilleure administration des lois du Canada, c'est-à-dire des lois fédérales. Le juge Bisson exposa que

> (...) chaque fois que non seulement se pose le probleme de la validité constitutionnelle d'une législation ou d'une réglementation fédérale mais encore que se pose comme question de fond — par opposition à une question implicite — un probleme de partage des compétences constitutionnelles entre deux instances, fédérale et provinciale (...) la Cour supérieure est compétente et peut être saisie d'une demande de réformation.
>
> Et ceci que la demande de réformation soit sollicitée à l'endroit d'un organisme administratif ou quasi judiciaire de création fédérale ou provinciale[21].

On peut dire finalement que le contrôle constitutionnel est au niveau provincial exercé principalement par des tribunaux dont la composition échappe totalement aux provinces.

Au sommet de la hiérarchie des tribunaux canadiens se trouve la Cour suprême du Canada créée par le Parlement fédéral en vertu de l'article 101 de l'A.A.N.B. 1867 et dont les juges sont désignés par le seul gouvernement fédéral.

Depuis l'abolition des appels devant le Comité judiciaire du Conseil privé, la Cour suprême est le tribunal du dernier ressort au Canada. Sa juridiction en matières criminelle et civile lui permet d'entendre les appels des décisions rendues par les plus hautes cours de dernier ressort de chaque province. Elle peut, en outre, aux termes de l'article 89 de la Loi sur la Cour suprême[22], sur des questions de droit et sur permission des plus hautes cours provinciales, entendre les appels des décisions rendues par un tribunal désigné à l'article 96 de l'A.A.N.B. Les appels *per saltum* ne sont cependant possibles que si le montant en jeu est supérieur à 2 000 $.

Aux termes de l'article 41 de la Loi et sous réserve du paragraphe 3 de cet article, la Cour suprême peut, même si la permission d'appeler a été refusée par un autre tribunal, entendre l'appel de tout jugement rendu par la plus haute cour de dernier ressort d'une province. La permission d'appeler est alors accordée par la Cour suprême en considération de l'importance de l'affaire pour le public, de l'importance de la question soulevée (question de droit ou question mixte de droit et de faits) ou encore de la nature de la question.

La plupart des décisions rendues par les tribunaux provinciaux sont donc susceptibles d'être révisées par la Cour suprême. Si l'article 96 ne joue ici aucun rôle, il contribue néanmoins grandement à l'application uniforme du droit jurisprudentiel dégagé par la Cour suprême. C'est en effet l'existence d'un contrôle éventuel de leurs décisions qui impose en pratique aux tribunaux inférieurs l'obligation de respecter les décisions des tribunaux qui exercent ce contrôle. Or, par l'effet de l'article 96, tous les tribunaux provinciaux inférieurs sont ainsi tenus de respecter les décisions des cours prévues par cet article, lesquelles appliquent elles-mêmes les décisions de la Cour suprême. Même si depuis 1975 la Cour suprême n'entend plus systématiquement les appels en matière civile[23], l'appel est toujours possible en cette matière en vertu de l'article 41 de la Loi qui régit cette Cour, et l'article 96 est donc un des principaux facteurs d'uniformisation du droit au Canada.

L'idée même d'uniformité du droit est naturellement contraire à la logique du fédéralisme; la seule uniformité requise devrait se rapporter à l'interprétation et à l'application des lois fédérales et, bien sûr, à l'interprétation de la constitution de l'État fédéral. L'anomalie du système judiciaire canadien au regard des principes directeurs du fédéralisme provient en grande partie de l'absence de distinction du recours constitutionnel par rapport aux autres types de recours et de l'existence de l'article 96. Ces deux facteurs combinés ont pour effet d'assujettir les lois provinciales, alors même que leur validité n'est pas contestée, au contrôle des tribunaux dont la composition échappe totalement aux provinces.

L'autre facteur d'anomalie provient indiscutablement de la juridiction de la Cour suprême et du processus de nomination des juges de cette Cour[24]. Le Parlement fédéral détermine la juridiction du tribunal de dernier ressort au Canada, et, en vertu de la prépondérance des lois fédérales, les provinces sont incapables de supprimer un droit d'appel, dans une matière relevant de leur compétence exclusive, si la Loi sur la Cour suprême le prévoit[25]. De plus, l'exécutif fédéral qui nomme les juges de la Cour suprême n'est aucunement tenu de consulter les provinces sur les choix qu'il effectue.

Indépendamment du rôle qu'il joue dans l'unitarisme du système judiciaire, l'article 96 constitue en outre une limite d'importance pour les provinces dans l'exercice de leur compétence législative.

L'article 96, facteur limitatif de la compétence législative des provinces

Les pères de la confédération ont opté pour un partage des compétences en matières d'administration de la justice. Il était donc évident dès 1867 que les articles 96 et 101 altéraient de manière importante, au même titre que l'article 91(27), la compétence provinciale dans ce domaine. Le rôle pernicieux que l'article 96 était appelé à jouer était par contre moins évident. C'est en effet l'interprétation judiciaire portant sur cet article qui a révélé son effet limitatif non seulement à l'égard de l'article 92(14) de l'A.A.N.B., mais également à l'égard de toutes les catégories de sujets énumérées par l'article 92 de l'Acte dans lesquelles les assemblées législatives ont une compétence qualifiée d'exclusive et que le Comité judiciaire du Conseil privé dira être aussi pleine et entière que celle que le Parlement impérial, dans la plénitude de ses attributions, possède[26].

Une abondante jurisprudence a tenté de cerner l'aire d'application du pouvoir de nomination fédéral qui, aux termes mêmes de l'article 96, s'exerce à l'égard des juges des cours supérieures, de district et de comté.

Les cours supérieures se définissent par rapport aux cours inférieures; ce sont celles qui détiennent une compétence de droit commun par opposition à une compétence d'attribution, et qui exercent un pouvoir de surveillance et de contrôle sur les tribunaux inférieurs et les corps politiques de la province. Cette notion relative de cour supérieure se révèle insuffisante lorsqu'il s'agit de cerner l'étendue du pouvoir de nomination de l'exécutif fédéral. Utilisée comme seul critère, elle permettrait aisément aux provinces de contourner l'article 96 en retranchant de la juridiction des cours supérieures pour augmenter corrélativement la compétence des tribunaux composés de juges nommés par la province, lesquels, ayant toujours une compétence d'attribution et étant toujours soumis au pouvoir de surveillance et de contrôle des cours supérieures, resteraient de ce fait des cours inférieures, soustraites au pouvoir de nomination fédéral. Il faut d'ailleurs noter que le problème ne serait nullement résolu dans les provinces qui ont des cours de district et de comté puisque ces dernières ont des compétences d'attribution.

Pour éviter que les provinces ne court-circuitent l'article 96, les juges ont développé un raisonnement par analogie des juridictions.

Par l'effet de l'article 129 de l'A.A.N.B., la juridiction tant matérielle que territoriale des tribunaux existant en 1857 restait inchangée. Les juges se réfèrent donc aux statuts préconfédératifs pour déterminer l'étendue de la juridiction que possédaient, à cette époque de référence, les cours visées à l'article 96. Toute compétence judiciaire estimée analogue à celle que détenaient ces cours sera jugée indûment conférée par les assemblées législatives à un tribunal non assujetti au pouvoir de nomination fédéral.

C'est le caractère de la juridiction qui doit être décelé. À l'heure actuelle, la jurisprudence est à l'effet que la fonction judiciaire sous examen ne doit pas être isolée de son contexte législatif; c'est ce dernier qui caractérise la juridiction. Cette approche jurisprudentielle, qui se trouve synthétisée dans l'affaire *Tomko c. Labour Relations Board (Nova Scotia) et al.*[27], atténue quelque peu, il est vrai, le caractère contraignant de l'article 96 sans toutefois l'éliminer.

Les tribunaux, en cherchant à caractériser la juridiction des cours supérieures, n'ont pas uniquement retenu la relation de subordination qui est établie, par l'intermédiaire du pouvoir de surveillance et de contrôle, entre ces cours et les tribunaux dits inférieurs. Les tribunaux ont envisagé ce pouvoir de surveillance comme une fonction, s'inscrivant dans la juridiction globale de ces cours.

En conclusion, on peut dire que la juridiction des cours supérieures a donc tout d'abord un aspect relationnel, lequel existe indépendamment de la nature du litige. En effet, dans l'affaire *Farrah*, la majorité des juges de la Cour suprême n'a pas semblé laisser aux assemblées législatives la possibilité d'octroyer le pouvoir de surveillance et de réforme à un tribunal autre qu'une cour supérieure, même si les institutions sur lesquelles ce pouvoir s'exerce n'existaient pas en 1867[28].

Outre cet aspect relationnel qui justifie l'utilisation du terme *cour supérieure*, la juridiction de ces cours est déterminée par référence à ce qu'elle était en 1867 et, à cet égard, elle a un contenu matériel variable selon les provinces concernées. Les assemblées législatives sont constitutionnellement inaptes à conférer à un tribunal composé de juges de leur choix une juridiction estimée analogue à celle des cours comprises à l'article 96, alors même que la matière législative qui détermine cette juridiction est de leur compétence exclusive.

En tant qu'élément d'intégration du système judiciaire, l'article 96 va au-delà de ce qu'il était nécessaire de prévoir. La remise du pouvoir de nomination à l'exécutif fédéral aurait pu s'accompagner d'une participation des provinces au choix des juges sans que la cohérence du système s'en trouve menacée pour autant. Par ailleurs, l'indépendance des juges provinciaux ainsi nommés, telle qu'elle existe à l'heure actuelle, n'est pas garantie par l'article 96 mais par d'autres dispositions de l'A.A.N.B. 1867.

En tant que facteur limitatif de la compétence provinciale, l'article 96 est radicalement opposé aux principes du fédéralisme. Ce deuxième rôle joué par cette disposition n'est pas à vrai dire indépendant du premier. Il n'en est que la conséquence. Cependant, il semble possible de circonscrire la portée du pouvoir de nomination de manière à minimiser ses effets négatifs et de manière à ne conserver que les éléments nécessaires à l'unitarisme judiciaire si tant est qu'une réforme constitutionnelle n'élimine pas ce dernier.

Une modification constitutionnelle du pouvoir fédéral de nommer certains juges provinciaux ne peut guère être envisagée que dans le cadre d'un fédéralisme renouvelé ou du statut particulier qui serait reconnu à une ou plusieurs provinces. L'indépendance du Québec, de même que la souveraineté-association, suppose bien évidemment l'élimination radicale d'un quelconque partage des compétences en matière d'administration de la justice au sein du nouvel État québécois. Le seul problème qui se poserait dans le cadre de la souveraineté-association serait relatif au processus de désignation des juges appelés à siéger au sein des instances juridictionnelles interétatiques. Ce problème se situe hors du champ de cette étude.

Les modifications possibles de l'article 96 dans le cadre du fédéralisme renouvelé

La révision de l'article 96, par opposition à sa suppression pure et simple, suppose qu'un choix préalable a été effectué, celui de conserver un système judiciaire unitaire.

La conservation d'un système judiciaire intégré

Dans ce cadre, l'article 96 peut être repensé à deux points de vue : quant à la participation des provinces au choix des juges sur lequel portera le pouvoir de nomination et quant à l'étendue du pouvoir de nomination.

La participation des provinces au choix des juges

Dans un système unitaire, le fait que les autorités fédérales « utilisent » les tribunaux provinciaux justifie une participation à la charge financière qui incombe aux provinces dans le domaine de l'administration de la justice. Cette participation s'effectue à l'heure actuelle par le prélèvement, sur les deniers fédéraux, du salaire des juges nommés conformément à l'article 96 (article 100 de l'A.A.N.B.).

Si tant est que le lien entre le pouvoir de nomination et le devoir de payer le salaire des personnes nommées ne soit pas susceptible d'être remis en question, rien ne s'oppose néanmoins à ce que soient distingués le pouvoir de nommer les juges, d'une part, et le pouvoir de choisir les juges à être nommés, d'autre part. Dans un système judiciaire intégré, les deux paliers de gouvernement ont un intérêt identique à contrôler la composition des tribunaux appelés à interpréter et à individualiser les normes fédérales et provinciales.

En 1978, lors de la conférence des premiers ministres provinciaux à Regina, l'unanimité s'est faite pour réclamer « (...) une consultation entière et sérieuse des provinces lors de la nomination des juges des Cours supérieures de district et de comté ». Il est difficile d'admettre que la simple consultation des exécutifs provinciaux, même obligatoirement imposée à l'exécutif fédéral, puisse être rangée dans les mécanismes de participation. La participation réelle des provinces au choix des juges peut s'effectuer selon quatre modalités, chacune étant susceptible d'aménagements divers.

Les mécanismes de participation. En premier lieu, les provinces concernées peuvent élaborer une liste de candidats à partir de laquelle l'exécutif fédéral devra procéder aux nominations. Cette modalité de participation est la plus contraignante pour les autorités fédérales dont la liberté de choix est relativement circonscrite. Cet inconvénient peut être minimisé par l'obligation imposée aux provinces de présenter des listes comportant un minimum de candidats, et par la possibilité, pour l'exécutif fédéral, de rejeter la liste au complet, obligeant ainsi les provinces à présenter une deuxième liste. Une redéfinition de l'article 96 devrait alors préciser le nombre de listes qui peuvent être ainsi refusées par le fédéral.

Les organes provinciaux habilités à confectionner la liste pourraient être diversement composés au gré des assemblées législatives. Ainsi, le procureur général de la province pourrait dresser une liste de candidats à proposer, et cette liste pourrait être soumise pour approbation à un comité composé de personnes émanant d'un organisme représentatif de la magistrature dans les provinces où il en existerait, du juge en chef de la cour où le nouveau juge est appelé à siéger, de représentants du Barreau et des facultés de droit. La liste pourrait d'ailleurs être élaborée par ce comité conjointement avec le procureur général et présentée par ce dernier à l'exécutif fédéral[29].

Les solutions quant au processus d'élaboration des listes sont nombreuses et devraient être laissées au choix des provinces. Il suffirait que le nouvel article 96 dispose que la liste sera présentée par le procureur général de la province.

En deuxième lieu, le processus décrit précédemment peut être renversé : l'exécutif fédéral présenterait alors une liste de candidats au procureur général de la province concernée qui seul, ou après consultation, ou encore conjointement avec un comité prévu par la loi provinciale, effectuerait le choix du juge à être nommé. Le nouvel article 96 devrait alors préciser le nombre de listes que les provinces pourraient rejeter avant de s'en voir imposer une.

En troisième lieu, la nomination des juges provinciaux pourrait être effectuée sur recommandation d'un organe mixte comprenant des représentants fédéraux et provinciaux. Au minimum, cet organe de recommandation serait composé des procureurs généraux fédéral et provinciaux.

En quatrième lieu, le choix effectué par l'executif fédéral pourrait être soumis au procureur général de la province qui, de son côté, pourrait être contraint par la loi provinciale à procéder à des consultations avant d'entériner ou de rejeter le choix de l'exécutif fédéral. Cette formule laisserait très peu de latitude aux provinces, en plus de poser le problème de déterminer le nombre de candidats qu'elles seraient autorisées à rejeter avant de se voir imposer un nom.

Le transfert du pouvoir de nomination aux provinces. Il se peut que, tout en sauvegardant l'unitarisme du système judiciaire canadien, le pouvoir de nomination des juges soit remis aux exécutifs provinciaux[30]. Mais il serait alors dans la logique du système que le fédéral participe à la désignation des juges de certains tribunaux provinciaux, et qu'une redistribution des revenus tienne compte de la charge financière additionnelle qui résulterait du paiement par les provinces des salaires de tous les juges provinciaux. Les modalités de participation au choix des juges, décrites précédemment, pourraient dès lors s'appliquer *mutatis mutandis* à la participation de l'exécutif fédéral.

La portée du nouvel article 96

C'est, nous l'avons vu, en cherchant à cerner la portée du pouvoir de nomination fédéral que les tribunaux ont mis en évidence les difficultés découlant de la rédaction de l'article 96. La simple référence à la dénomination des cours visées par le pouvoir de nomination fédéral soulèverait, à plus ou moins brève échéance, les mêmes problèmes. Il faudrait nécessairement recourir au raisonnement par analogie historique, la date de référence étant simplement déplacée dans le temps. Le nouvel article 96 devrait donc cerner, le plus précisément possible, les caractéristiques de la juridiction des tribunaux visés et circonscrire ainsi la portée du pouvoir de nomination fédéral, si l'on choisit de le laisser subsister, ou encore cerner ainsi l'étendue du pouvoir fédéral de participation à la désignation des juges provinciaux, si le pouvoir de nommer tous les juges provinciaux était transféré aux provinces.

Dans l'hypothèse d'une modification constitutionnelle qui ne remettrait pas en cause l'essentiel de l'unitarisme du système judiciaire, la portée du pouvoir de nomination pourrait être différemment envisagée selon que le recours constitutionnel serait distingué ou non des autres types de recours.

Le contrôle constitutionnel reste un aspect du contrôle de la légalité. C'est le système actuel qui serait alors maintenu. Sous réserve d'un particularisme restreint à la procédure qui régirait un tel recours[31], le contrôle constitutionnel déclenché s'intégrerait dans le contrôle de la légalité au sens large. Une révision de l'article 96 devrait alors permettre de limiter les effets néfastes de cette disposition en sauvegardant l'essentiel de son rôle dans le système judiciaire.

S'il est normal de reconnaître aux autorités fédérales un droit de regard sur la composition des tribunaux provinciaux qui sont appelés à individualiser et à interpréter les lois fédérales, les provinces devraient être libres de toute contrainte quant à la composition des instances juridictionnelles appelées à interpréter et à individualiser les lois provinciales et les normes juridiques qui leur sont subordonnées lorsque leur validité constitutionnelle n'est pas mise en doute.

Donc, si le contrôle constitutionnel n'est pas distingué du contrôle de la légalité, on pourrait concevoir que la juridiction des tribunaux visés par le nouvel article 96 soit définie de telle manière qu'elle ne soit contraignante pour les provinces à l'égard de cette partie du contrôle de la légalité, qui est essentielle pour permettre d'identifier une norme inconstitutionnelle, soit le contrôle portant sur la compétence des organes normatifs provinciaux. À moins de dispositions dérogatoires contenues dans les lois fédérales, en vertu des lois provinciales attributives de compétence, ces tribunaux pourraient exercer en outre l'entier contrôle de légalité dans le cadre des lois fédérales et des normes juridiques afférentes à ces lois[32].

En pratique, ces tribunaux seraient les cours supérieures et les cours d'appel de dernier ressort dans chaque province qui actuellement sont déjà visées par l'article 96. Mais l'avantage de cette solution par rapport à la situation présente nous semble grand. Tout en sauvegardant l'uniformité du droit dans ce qu'elle a d'essentiel dans un État fédéral, c'est-à-dire l'uniformité de l'interprétation des lois fédérales et de la constitution de l'État, elle présenterait en outre l'avantage de desserrer le carcan dans lequel l'actuel article 96 enferme inutilement les assemblées législatives provinciales. Ces dernières pourraient, sans que les intérêts fédéraux en souffrent, transférer une partie du contrôle de la légalité aux tribunaux de leur choix. L'appel sur les questions de droit ne mettant pas en jeu la compétence des organes normatifs provinciaux, il pourrait, au gré des assemblées législatives, être retranché de la juridiction des cours d'appel provinciales pour être inclus dans la compétence des tribunaux que l'on qualifie d'inférieurs à l'heure actuelle.

Toute question portant sur la validité d'une loi ou d'un règlement, soulevée aux stades préliminaires par une partie au litige, devrait obliger les tribunaux non visés par le nouvel article 96 à se déclarer incompétents. Par bref de prérogative ou par voie d'appel, des tribunaux visés par le nouvel article 96 seraient toujours à même de contrôler les décisions rendues par les tribunaux inférieurs en dehors de leur compétence.

La limitation de la portée actuelle de l'article 96 pourrait être complétée par le pouvoir des assemblées législatives de supprimer tout appel à la Cour suprême, hormis sur des questions de compétence, dans des domaines relevant de leur pouvoir législatif[33]. La nouvelle constitution devrait par ailleurs prévoir un mécanisme de participation des provinces à la désignation des juges de cette cour, de même qu'elle devrait en établir la juridiction[34].

Le recours constitutionnel est distingué des autres recours. Cette distinction serait soit la cause, soit la conséquence d'une modification de l'article 96.

Dans le premier cas, la détermination du forum constitutionnel serait effectuée par la constitution. Selon la solution retenue par les constituants, l'article 96 pourrait se trouver différemment modifié dans sa teneur.

Dans le second cas, c'est la rédaction même de l'article 96 qui obligerait les assemblées législatives à distinguer le recours constitutionnel des autres recours, le premier ne pouvant s'inscrire que dans la compétence des tribunaux visés par le nouvel article 96.

La constitution détermine le forum constitutionnel. Les constituants ont le choix entre diverses possibilités. Premièrement, la distinction du recours constitutionnel peut être alors la résultante de la détermination par la constitution de la juridiction obligatoire de la Cour suprême qui serait, dans cette hypothèse, limitée aux appels en matière de droit fédéral et en matière constitutionnelle.

La limitation de la juridiction de la Cour suprême, il faut le présumer, résulterait de l'intention d'atténuer le caractère unitaire du système judiciaire canadien dans ce qu'il a d'excessif. Les tribunaux provinciaux continueraient à appliquer les lois fédérales, mais les appels devant la Cour suprême pourraient, en matière de droit provincial, être supprimés au gré des assemblées législatives.

Dans ce contexte, on peut raisonnablement penser que la teneur de l'article 96 se trouverait modifiée. Le pouvoir de l'exécutif fédéral de contribuer à la désignation des juges provinciaux pourrait être limité aux juges des tribunaux provinciaux qui exercent le contrôle de la légalité en matière de droit fédéral ainsi que le contrôle constitutionnel.

Là encore, en pratique, les cours touchées par le nouvel article 96 seraient les cours supérieures provinciales — y compris les cours d'appel. Comme dans la solution examinée précédemment, la référence à la juridiction caractéristique des cours assujetties au pouvoir fédéral aurait le mérite d'alléger la contrainte que l'actuel article 96 impose aux assemblées législatives. Par rapport à la solution précédente, l'amélioration serait en outre notable. Les provinces pourraient confier l'entier contrôle de la légalité à des tribunaux composés de juges nommés exclusivement par les exécutifs provinciaux. Il leur serait ainsi possible de créer sans entrave des tribunaux administratifs coiffés d'une véritable cour d'appel administrative, ce qu'elles sont empêchées de faire à l'heure actuelle et qu'elles ne pourraient pas davantage faire dans le cadre de la solution précédemment envisagée.

Le deuxième choix qui s'offre aux constituants consiste à confier le contrôle constitutionnel à des tribunaux spécialisés.

L'existence des tribunaux constitutionnels provinciaux peut être prévue par la constitution en même temps que l'existence d'une cour constitutionnelle fédérale de dernier ressort. Pour que cette solution se distingue, en pratique, de la précédente, il faudrait que les cours constitutionnelles aient pour unique fonction d'effectuer le contrôle constitutionnel.

Les tribunaux provinciaux de droit commun continueraient à appliquer les lois provinciales et fédérales, mais toute question constitutionnelle soulevée au cours d'un litige obligerait le tribunal saisi à renvoyer la cause devant la cour constitutionnelle provinciale dont la décision serait susceptible d'appel à la cour constitutionnelle fédérale. Les tribunaux créés par loi fédérale devraient également renvoyer toute question constitutionnelle, soit devant un tribunal fédéral de premier ressort ayant juridiction exclusive et unique en la matière, soit directement devant la Cour suprême[35].

Dans le cadre de cette hypothèse, la rédaction du nouvel article 96 ne pourrait qu'être plus défavorable aux provinces que dans l'hypothèse précédente. Il serait en effet logique de reconnaître à l'exécutif fédéral le droit de participer, non seulement à la composition des tribunaux provinciaux de droit commun qui effectuent le contrôle des décisions rendues par les tribunaux appliquant les lois fédérales, mais également de lui reconnaître un droit de regard quant à la composition des cours constitutionnelles provinciales.

La constitution peut confier la juridiction en matière constitutionnelle à un tribunal unique ou à une formation spéciale de la Cour suprême du Canada. Toute question constitutionnelle soulevée au cours d'un litige devrait automatiquement être renvoyée devant la Cour constitutionnelle.

Il ne nous appartient pas, dans le cadre de cette réflexion, de nous prononcer sur les mérites ou les désavantages qui peuvent s'attacher à un tel choix[36]. Seules les incidences possibles sur la portée éventuelle de l'article 96 sont à considérer ici. À cet égard, il est alors possible de limiter le contrôle fédéral portant sur la composition des cours provinciales. Le nouvel article 96 pourrait en effet disposer que l'exécutif fédéral nomme ou participe à la nomination des juges des cours provinciales qui effectuent le contrôle de la légalité dans le cadre des lois fédérales.

La libération qui résulterait d'une telle rédaction de l'article 96 pourrait néanmoins se trouver considérablement atténuée si la juridiction obligatoire de la Cour suprême n'était pas limitée de telle manière que les assemblées législatives puissent supprimer les appels à la Cour suprême en matière de droit provincial.

La modification du texte de l'article 96 oblige les assemblées législatives à distinguer le recours constitutionnel. Dans cette hypothèse, ou bien la constitution laisserait au Parlement fédéral le soin de déterminer la juridiction de la Cour suprême, ou bien elle se bornerait à prévoir la possibilité, pour les provinces, de supprimer les appels à la Cour suprême en matière de droit provincial. Dans les deux cas, la rédaction du nouvel article 96 pourrait limiter la portée de l'intervention fédérale dans la composition des tribunaux provinciaux. Définies par leur juridiction caractéristique, les cours visées pourraient être celles qui exercent le contrôle de la légalité des décisions rendues par les tribunaux provinciaux dans le cadre des lois fédérales ainsi que le contrôle constitutionnel.

Cependant, l'avantage pour les provinces d'une telle rédaction pourrait, là encore, se trouver grandement neutralisé si, malgré la possibilité qui leur serait alors offerte de disposer librement du contrôle de la légalité dans les matières législatives qui relèvent de leur compétence, les assemblées législatives ne pouvaient évincer le contrôle de la Cour suprême. L'avantage, par contre, resterait entier si la constitution prévoyait la faculté de supprimer les appels à la Cour suprême.

Dans la perspective d'un fédéralisme renouvelé qui ne remettrait pas en question le principe même de l'intégration du système judiciaire, il serait néanmoins nécessaire de rendre ce dernier plus compatible avec les principes directeurs du fédéralisme et de chercher par conséquent à établir un meilleur équilibre des pouvoirs entre les paliers fédéral et provincial de juridiction. L'article 96, facteur important de l'unitarisme judiciaire, devrait donc être repensé en conséquence.

Il se peut néanmoins que les constituants préfèrent créer un système judiciaire différent dans son principe, autrement dit, qu'ils renoncent à l'unitarisme en faveur du dualisme.

L'instauration d'un système judiciaire dualiste

C'est évidemment le système dualiste qui respecte le mieux les principes du fédéralisme. Dans un tel système, les tribunaux des États-membres de la fédération appliquent les lois locales et exercent l'entier contrôle de la légalité au regard de ces lois. Les tribunaux fédéraux sont chargés de l'application des lois et règlements fédéraux. Le dualisme judiciaire, en vigueur aux États-Unis et dans certaines fédérations latino-américaines, est sensé effectuer une séparation hermétique entre les deux ordres de tribunaux. Néanmoins, aux États-Unis, en matière constitutionnelle notamment, la juridiction concurrente des tribunaux des États-membres et des tribunaux fédéraux est assez étendue.

Les États-membres s'étant dotés d'une constitution formelle, les tribunaux locaux assument de manière exclusive et finale le contrôle de la constitutionnalité des actes normatifs posés par les autorités locales au regard de la constitution de l'État-membre. Aucun appel ne peut être porté devant la Cour suprême lorsque seules les constitutions des États ou les lois locales sont en jeu. Les tribunaux fédéraux contrôlent la constitutionnalité des lois et règlements fédéraux au regard de la constitution de l'État fédéral et sont coiffés par la Cour suprême des États-Unis.

Nombre de litiges portés devant les tribunaux d'État mettent en jeu la validité d'une loi locale au regard de la constitution fédérale ou d'une loi fédérale. Dans chacun de ces cas et quelle que soit la décision rendue par le plus haut tribunal de l'État, la Cour suprême peut être saisie ou se saisir elle-même de la cause. Le demandeur est d'ailleurs libre de porter le litige devant un tribunal d'État ou devant un tribunal fédéral. Le défendeur peut, en outre, demander que la cause présentée devant un tribunal d'État soit portée devant un tribunal fédéral. Il s'agit donc là de juridiction concurrente, mais les tribunaux fédéraux sont privilégiés.

Les compétences judiciaires de l'État fédéral et la juridiction originale de la Cour suprême sont définies et, par conséquent, protégées par la constitution fédérale.

La juridiction originale de la Cour suprême, juridiction qu'elle partage avec les tribunaux fédéraux, a trait, entre autres, aux conflits entre l'État fédéral et les États-membres, entre un État et un citoyen d'un autre État. Sa juridiction est exclusive à l'égard des conflits entre États ou de litiges mettant en cause des diplomates ou ministres étrangers[37].

Si un tel système était instauré au Canada, il est clair que l'existence d'un article 96 dans la constitution ne se justifierait plus. Les autorités provinciales nommeraient tous les juges provinciaux, et les autorités fédérales tous les juges des tribunaux fédéraux. Le seul problème qui subsisterait, quant à la nomination des juges, serait relatif aux juges de la Cour suprême. Un mécanisme de participation devrait permettre aux provinces d'exercer, d'une manière ou d'une autre, un contrôle sur le choix des juges. Aux États-Unis, c'est par l'intermédiaire du Sénat que cette participation s'effectue; mais d'autres mécanismes sont concevables[38].

Les modifications possibles de l'article 96 dans le cadre du statut particulier

Dans cette hypothèse, la répartition des compétences entre le fédéral et les autres membres de la fédération serait distincte à certains égards de celle qui serait prévue entre le fédéral et le Québec, sans que le principe fédératif ne s'en trouve néanmoins affecté. Il s'agirait donc d'un aménagement particulier du partage des compétences.

En ce qui concerne l'article 96, la nouvelle constitution pourrait déclarer que la disposition qui le remplace est sans effet à l'égard du Québec.

Le statut particulier pourrait encore résulter de la rédaction même du nouvel article 96.

La non-application au Québec du nouvel article 96

La seule justification rationnelle de l'actuel article 96 réside dans l'unitarisme du système judiciaire. On peut difficilement concevoir que les autorités fédérales aient accepté de se départir, pour l'avenir, de tout droit de regard sur la composition des tribunaux québécois si ces derniers devaient continuer à appliquer les lois fédérales. On peut donc raisonnablement inférer que la non-application au Québec du nouvel article 96 trouverait sa justification dans un aménagement du système judiciaire qui, à l'égard du Québec seulement, se caractériserait par son dualisme.

Dans cette hypothèse, les tribunaux québécois seraient chargés de l'interprétation et de l'application des seuls lois et règlements québécois, et dans ces domaines leur compétence serait exclusive et finale.

Des tribunaux fédéraux, chargés de l'application des lois fédérales, devraient alors être institués dans cette province, ce qui suppose que la répartition de la compétence législative en matière d'administration de la justice serait aménagée en conséquence, puisque, pour ne prendre qu'un exemple et si tant est que la compétence législative en matière de droit criminel reste fédérale, les cours de juridiction criminelle devraient être établies par loi fédérale.

La constitution devrait déterminer de la manière la plus précise possible les domaines de juridiction concurrente des tribunaux fédéraux et québécois — en matière constitutionnelle notamment — ainsi que la juridiction du tribunal de dernier ressort qui pourrait être la Cour suprême du Canada, ou encore une formation spéciale de la Cour suprême du Canada, comprenant, outre des juges de cette cour, d'autres personnes qui ne seraient appelées à siéger que lorsque le Québec serait concerné par un litige. Cette composition de l'organe juridictionnel de dernier ressort serait d'ailleurs plus compatible avec le statut particulier, le Québec ayant alors des intérêts distincts des autres membres de la fédération. Le mode de participation du Québec à la désignation des membres du tribunal de dernier ressort devrait également être prévu par la constitution.

L'aménagement d'une telle relation entre le fédéral et le Québec présente bien évidemment l'inconvénient d'entraîner une duplication des dépenses, et rendrait logique une répartition des revenus différentes de celle qui serait prévue entre le fédéral et les autres membres de la fédération.

Bien que source d'inconvénients d'ordre pratique, le choix de ce type de relation particuliere reste théoriquement possible.

Le statut particulier découlant de la rédaction même du nouvel article 96

L'unitarisme du système judiciaire resterait alors la règle dans l'ensemble de la fédération, mais un de ses facteurs, soit l'actuel article 96, serait aménagé de façon particulière en ce qui concerne le Québec.

Le pouvoir de nomination pourrait être laissé à l'exécutif fédéral, et les modalités de participation au choix des juges des tribunaux québécois pourraient être prévues différemment, en ce qui regarde le Québec, de celles qui prévaudraient dans les autres provinces.

On peut également concevoir que l'exécutif fédéral nomme les juges de certains tribunaux dans toutes les provinces autres que le Québec, et que le nouvel article 96 précise alors les modalités de participation de l'exécutif fédéral au choix des juges des tribunaux québécois visés, lesquels seraient nommés par l'exécutif québécois.

Le particularisme du Québec serait, dans l'un ou l'autre cas, sans grande incidence sur le système judiciaire canadien.

Quant à la portée de l'intervention fédérale, chacune des limitations possibles envisagées dans le cadre du fédéralisme renouvelé pourrait être prévue en faveur de la seule province de Québec ou encore, l'une d'elles être en vigueur dans les autres provinces alors qu'une autre serait particulière au Québec[39].

La souveraineté-association

Quelle que soit la forme de l'entente qui constituerait l'association, cette dernière serait le fruit du consensus de deux États souverains. Dans ce contexte, la constitution canadienne ne saurait imposer d'obligations au Québec qui, de par son accession à la souveraineté, aurait automatiquement acquis la maîtrise absolue de ses affaires internes et, par conséquent, de la composition de ses tribunaux. Laissé tel quel, l'article 96 de l'A.A.N.B. 1867 deviendrait sans objet à l'égard du Québec, sans qu'il soit nécessaire de le spécifier formellement. Modifié dans sa teneur et sa portée, il ne saurait être applicable qu'aux entités membres de la fédération canadienne dont le Québec se serait détaché.

Le traité associant le Canada au Québec devrait certes contenir des dispositions concernant les procédures de nomination des juges, mais elles auraient trait aux juges des instances juridictionnelles communes chargées d'interpréter le traité d'association[40].

L'indépendance du Québec

Les commentaires relatifs à la souveraineté-association sont bien évidemment applicables au cas de l'accession d'une province canadienne au statut d'État au sens juridique que ce terme revêt. Associé ou non à l'État dont il s'est séparé, le nouvel État disposerait désormais de la « compétence de sa compétence » qui n'est autre que la souveraineté. Il ne saurait dès lors être concerné par une disposition de la constitution canadienne.

Conclusion

Accroc manifeste au principe fédératif que l'A.A.N.B. 1867 était censé consacrer, l'article 96 devrait normalement être remis en question dans la perspective d'une réforme constitutionnelle.

Le choix initial qui s'offre aux constituants est apparemment simple. Il s'agit ou bien de supprimer l'article 96 ou bien de le modifier. Sa suppression pure et simple n'est concevable, en bonne logique, que dans le cadre d'une transformation radicale du système judiciaire qui, d'unitaire, deviendrait dualiste. Un tel bouleversement rendrait nécessaire un réaménagement des compétences législatives en matière d'administration de la justice et une définition constitutionnelle de la juridiction des tribunaux, notamment de la Cour suprême. L'impact financier de l'instauration d'un tel système devrait, en outre, être pris en considération lors de la répartition des revenus entre le fédéral et les provinces.

Ce n'est pas tant le principe même de l'intégration du système judiciaire qui est critiquable en soi au regard des principes du fédéralisme que son caractère excessif. Entre le système actuel, outrancier et bâtard, et le dualisme judiciaire, il y aurait place pour une solution intermédiaire. La révision de l'actuel article 96 pourrait précisément être effectuée dans la perspective de la recherche d'un juste milieu.

La remise en question de l'article 96 devrait être globale, c'est-à-dire porter à la fois sur le caractère unilatéral du pouvoir de nomination qu'il confère et sur la portée de ce pouvoir, l'un et l'autre posant des problèmes distincts mais également importants. À ce niveau de la réflexion, les auteurs de la réforme constitutionnelle devront faire un choix parmi différentes solutions. La tâche sera délicate, chacune de ces solutions posant des problèmes techniques particuliers. Par ailleurs, le raisonnement devra tenir compte de l'interaction des actuels articles 96 à 101, toute modification de l'une de ces dispositions étant susceptible d'avoir des effets, variables d'ailleurs, sur l'ensemble du système judiciaire canadien.

Notes

1. L'historique de l'article 96 se trouve expose dans l'ouvrage de Gilles Pépin, *Les tribunaux administratifs et la constitution, études des articles 96 a 101 de l'A.A.N.B.*, Montreal, Les presses de l'universite de Montréal, 1969, pp. 78 et sqq.

2. Voir les propos de Lord Blanesburgh dans *O. Martineau and Sons Ltd.* c. *City of Montreal*, (1932) A.C. 113; 3 Olmsted 1, pp. 8 et 9, souvent cites dans les decisions canadiennes.

3. *Debats parlementaires sur la question de la confédération des provinces de l'Amerique Britannique du Nord*, Quebec, Hunter, Rose et Lemieux, 1865, p. 394; Pepin, *Les tribunaux administratifs* . . ., p. 83.

4. Voir W.R. Lederman, « The Independence of the Judiciary », *La revue du Barreau canadien*, 34 (1956), p. 778.

5. *Ibid.*

6. *Ibid.*, pp. 782 et sqq.

7. Duncan McArthur, « Constitutional History, 1763–1840 », dans *Canada and Its Provinces. A History of the Canadian People and Their Institutions of One Hundred Associates*, Adam Shortt et Arthur G. Doughty, ed. gen., Toronto, Glasgow, Brook & Company, 1914, vol. 4, pp. 462–463; W.R. Lederman, « The Independence of the Judiciary », pp. 1149–1150.

8. Voir le chapitre de James C. McPherson, « The Potential Implications of Constitutional Reform for the Supreme Court of Canada », dans *Canada and the New Constitution: The Unfinished Agenda*, Stanley M. Beck et Ivan Bernier, ed., Montreal, l'Institut de recherches politiques, 1983.

9. *Ibid.*

10. (1879) 3 R.C.S. 1, p. 46. Voir egalement l'opinion du juge Ritchie, p. 35; Pepin, *Les tribunaux administratifs* . . ., p. 80.

11. Voir l'opinion du juge-en-chef de la Cour suprême de l'Alberta dans *Re Small Debts Recovery Act*, (1917) 37 D.L.R. 170, p. 176. Voir egalement l'opinion du juge Choquette de la Cour d'appel du Quebec dans *Renvoi concernant la constitutionnalite de la loi concernant la juridiction de la cour de magistrat, 11–12 Elizabeth II, Chapitre 62*, (1965) B.R. 1, p. 21; Bora Laskin, « Municipal Tax Assessment and Section 96 of the British North America Act: The Olympia Bowling Alleys Case », *La revue du Barreau canadien*, 33 (1955), p. 998.

12. *Debats parlementaires*. . ., pp. 580–581; Laskin, « Municipal Tax Assessment. . . », p. 998.

13. Notamment quelques federations latino-americaines, telles que le Mexique, l'Argentine et le Venezuela.

14. Voir Jacques Brossard, *La Cour suprême et la Constitution. Le forum constitutionnel au Canada*, Montréal, Les presses de l'université de Montréal, 1968, pp. 66–73.

15. *Dupont et al.* c. *Inglis et al.*, (1958) R.C.S. 535.

16. (1978) 2 R.C.S. 638.

17. En interpretant de telles clauses, les tribunaux canadiens, suivant en cela les tribunaux anglais, sont partis d'un postulat : le législateur, en déléguant une competence, octroie une juridiction nécessairement limitée. Il ne peut être incoherent au point de soustraire le bénéficiaire de la délégation à toute forme de contrôle, y compris celui qui porte sur l'étendue de sa juridiction. Voir, par exemple, *Ex. p. Hopwood*, (1850) 15 Q.B. 121; *Colonial Bank of Australia* c. *Willan*, (1874) 5 A.C. 417.

18. (1973) R.C.S. 681, p. 686.

19. (1981) C.A. 62.

20. Voir, dans le même sens, la décision de la Cour d'appel du Manitoba dans *Re James Richardson & Sons Ltd. and Minister of National Revenue*, (1981) 117 D.L.R. (3d) 557.

21. (1981) C.A. 62, p. 68. La question de la compétence concurrente de la Cour fédérale en matière de contrôle constitutionnel ne se posait pas; la Cour n'exprima donc aucune opinion sur ce point.

22. S.R.C. 1970, chap. S-19, tel qu'il a été amendé par S.C. 1974–75–76, chap. C. 18.

23. Comme c'était le cas auparavant lorsque la somme en litige était supérieure à 10 000 $.

24. Sur la Cour suprême, voir le chapitre de Peter W. Hogg, « Administration of Justice: An Introduction », dans *Canada and the New Constitution: The Unfinished Agenda*, Stanley M. Beck et Ivan Bernier, éd., Montréal, l'Institut de recherches politiques, 1983; et celui de MacPherson, « The Potential Implications. . . ».

25. *Crown Grain Company, Limited* c. *Day*, (1908) A.C. 504; 1 Olmsted 546.

26. *Hodge* c. *The Queen*, (1883–84) 9 A.C. 117; 1 Olmsted 184.

27. (1977) 1 R.C.S. 112. Voir notre commentaire de cette décision, « Nouvelles récentes de l'article 96 », *Cahiers de droit*, 18 (1977), pp. 315–333. Sur l'évolution de l'interprétation à laquelle l'article 96 a donné lieu, voir Pépin, *Les tribunaux administratifs*. . ., pp. 78 et sqq.

28. Voir notre commentaire de la décision, « Le contrôle de la légalité : une compétence exclusive des cours supérieures », *Cahiers de droit*, 19 (1978), pp. 1069–1079.

29. Cette solution aurait le mérite de limiter les possibilités de choix partisans. À l'heure actuelle, l'article 96, joint aux articles 97 et 98, n'empêche nullement le gouvernement fédéral de désigner des juges en fonction de critères parmi lesquels l'adhésion à son idéologie politique occupe un rang supérieur à celui de la compétence. Dans cette perspective, l'article 96 contribue à limiter le choix en permettant d'éliminer les candidats qui, pour entretenir des relations avec les partis politiques provinciaux minoritaires au niveau fédéral, n'en sont pas moins d'excellents juristes. Si les provinces devaient être responsables de la sélection des juges, il serait souhaitable que les assemblées législatives fixent des mécanismes d'élaboration de listes de candidats qui soient susceptibles d'affermir le crédit de la magistrature aux yeux des justiciables en minimisant les dangers de désignations partisanes.

30. Lors de la conférence sur la constitution en 1978, l'Ontario préconisait un tel transfert du pouvoir de nomination, sans toutefois remettre en question l'unitarisme judiciaire. Une proposition identique se retrouve dans le document émis en 1980 par la Commission constitutionnelle du parti libéral du Québec (*Une nouvelle fédération canadienne*, Montréal, le parti libéral du Québec, 1980).

31. Voir, pour le Québec, l'article 95 du *Code de procédure civile*, L.R.Q. 1977, chap. C-25.

32. La révision de l'article 101 de l'A.A.N.B. pourrait, en outre, être effectuée de manière à éliminer le facteur de distorsion du principe de l'unitarisme qu'il contient. Le parti libéral du Québec, dans son document sur la réforme constitutionnelle, propose d'éliminer le pouvoir fédéral de créer des cours additionnelles. Mais il propose d'inclure une disposition reconnaissant explicitement aux parlements fédéral et provinciaux le pouvoir de créer des tribunaux administratifs, lesquels seraient assujettis au pouvoir de surveillance et de contrôle des cours supérieures provinciales. Si cette suggestion était retenue, les clauses privatives tant fédérales que provinciales pourraient limiter

le contrôle effectué par les cours visées par le nouvel article 96 au contrôle portant sur la compétence des organes normatifs fédéraux et provinciaux.

33. Les opinions sur ce point sont très partagées. Voir MacPherson, « The Potential Implications. . . », où l'auteur examine les divers points de vue et se prononce contre une telle solution.

34. *Ibid.*

35. Si tant est que l'article 101 ne soit pas révisé de manière à enlever au Parlement fédéral tout pouvoir de créer des cours additionnelles.

36. Pour une discussion relative à ce choix, voir MacPherson, « The Potential Implications. . . ».

37. Brossard, *La Cour suprême*. . ., pp. 55 – 66.

38. Voir MacPherson, « The Potential Implications. . . ».

39. *Ibid.* sur la modification de la portée de l'article 96 dans le cadre du fédéralisme renouvelé. Les remarques faites à propos de chacune des modifications possibles s'appliquent ici.

40. *Ibid.*

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The Potential Implications of Constitutional Reform for the Supreme Court of Canada

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The Potential Implications of Constitutional Reform for the Supreme Court of Canada

Introduction

A traditional and important part of constitutional law is the study of how the decisions of a final court affect the constitution of a country. The purpose of this paper is to discuss the opposite relationship, that is, the effect that the Canadian Constitution, particularly a revised one, might have on the Supreme Court of Canada. I shall attempt to describe and analyse what might happen to the Court's status, composition, and jurisdiction if the Canadian federal system undergoes a substantial constitutional re-arrangement.

There are basically four possible constitutional re-arrangements that might take place in Canada over the next few years. They are revised federalism,[1] special status for one or more provinces or regions,[2] sovereignty-association for Quebec,[3] independence for Quebec.[4] In this article, following a brief description of the status, composition, and jurisdiction of the present Supreme Court of Canada, I shall discuss the consequences for the Court and for the administration of justice in Canada of each of the four models of reform. The discussion will be descriptive, since some consequences are easily discernible; speculative, since some consequences are difficult to detect;

and critical, in the sense that I shall try to evaluate the merits, for the Court and for the better administration of justice in Canada, of the consequences that might flow from constitutional reform.

Role of Final Courts in General

Canada is a federal constitutional democracy.[5] Both the noun 'democracy' and the adjectives 'federal' and 'constitutional' indicate a potential, although not a compulsory, role for a final court.

The essence of federalism is a division of legislative powers between two levels of government. This division is not often clearly defined;[6] nor is it likely to be static. There is, therefore, usually a need for an institution — an umpire — to resolve jurisdictional disputes between the two levels of government. In all five Western federations, the courts, in particular the highest court, perform this 'umpiring' function.

The essence of constitutionalism is the notion of limited government. A constitution, whether written or unwritten, can limit governments in two ways: first, by imposing restrictions on what the different components of a single government can do *vis-à-vis* one another;[7] secondly, by imposing restraints on a single government's conduct either in relation to other governments in the country[8] or in respect to its own citizens.[9] A final court is often given the power to adjudicate disputes thrown up by all three of these relationships. In doing this the court will play a large role in defining just how 'limited', as opposed to 'arbitrary', will be the government in a country.

The essence of democracy is openness of the decision-making process and actual decisions based on the wishes of the majority of the citizens of the country. The concepts of federalism, separation of powers, and civil liberties, described above, are intended, in part, to promote democratic values. So a final court with jurisdiction in these three areas will be involved, perhaps indirectly and unconsciously, in the protection of democratic values. More obviously, a final court may be called upon to interpret constitutional[10] or statutory[11] provisions that relate directly to democratic values.

It is clear, then, that a political system and a governmental structure that are federal, constitutional, and democratic present a wide range of potential functions for final courts in the structuring of relationships between a government and its citizens or other governments. Moreover, once those relationships are set, a final court may be called upon to interpret the legislative products of government, that is, statutes and regulations. Lastly, in many countries, a final court may create law of its own motion. For example, in much of the area of private law, where governments may have no strong interest, a final court may make laws that define the relationships between individual citizens in such important fields as tort,[12] property, and commerce. In exercising these last two non-constitutional functions, that is, the interpretation of legislation and the formulation of private law principles, a final court can perform an incalculable service in settling those disputes about the laws of a country that are confusing to the legal profession, the lower courts, and ordinary citizens.

Role of a Final Court in Canada

It was always anticipated that Canada would have a final court that would perform at least some of the functions described above.[13] The actual location of final appellate authority has varied at different times in Canadian history,[14] but the idea and the reality of a final court have been constant themes of our national life.

The role of Canada's two final courts, the Privy Council and the Supreme Court of Canda, can be generally described[15] in two propositions. First, the jurisdiction of the final court has been, and is, integrated and comprehensive. The Court sits at the apex of a largely unitary court system[16] and decides cases in every field of law. In this respect the Canadian final court follows the British model of a non-specialist final court adjudicating a wide range of legal disputes. This differs from the common European model of specialist final courts with narrow truncated jurisdiction and from the United States Supreme Court whose case load consists of a substantial core of constitutional matters so that it has become almost a specialist constitutional court. Secondly, within their comprehensive jurisdiction, Canadian final courts traditionally have been involved, for the most part, in private law adjudication. Disputes between individual citizens, and not between governments and citizens or between governments and governments, have provided the largest portion of the work of Canada's highest courts. This, again, sets off the Canadian courts from those in Europe and the United States, where public law issues form a very large percentage of the work load of the final courts.

The Supreme Court of Canada: Its Existing Framework

Status or Position

The Supreme Court of Canada is at the apex of the Canadian judicial system. It exercises final appellate jurisdiction over all lower courts in every field of law. In exercising this jurisdiction the Court resolves disputes between different citizens, between governments and citizens, and between governments. In these last two situations, in its roles as umpire of the federal system and interpreter of civil liberties legislation, the Court, in effect, rules on the validity (in a constitutional sense) of government policy and conduct. This places it, in some respects, at the apex both of the political system and of the judicial system. Yet, in spite of the elevated, visible, and important nature of the Court's position, that position is not provided for in the British North America (BNA) Act,[17] or in any other constitutional document, or in any convention of the Constitution. The Constitution merely provides for the possibility of a final court. Section 101 of the BNA Act provides: "The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time, provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada."[18] Acting on the basis of this section, Parliament, by ordinary statute, created the Supreme Court in 1875.[19] Since then the composition and jurisdiction of this Court have been changed on several occasions, but every change has been achieved by simple amendment of the Supreme Court Act. The Court originally was, and today is, a creation of the federal level of government. Its very existence, as well as its structure and powers, are dependent entirely on that government.[20]

Structure or Composition

The composition of the current Supreme Court of Canada flows from three sources: the Supreme Court Act, simple governmental practice and, possibly, constitutional convention.[21] Three factors are relevant in considering the composition of the Supreme Court: the total size of that body, the geographic distribution of its judges, and their background and experience.

The Supreme Court Act stipulates the total size of the Court and, to a degree, the geographic distribution of its judges.

Section 4 of the Act establishes a Court consisting of a Chief Justice and eight puisne[22] justices.[23] Section 6 provides that at least three of the judges must come from Quebec, but the Act does not stipulate the geographic distribution of the other six judges. In spite of this, the actual distribution did not vary from 1949 to 1978: there were always three judges from Ontario, two from the West and one from the Atlantic provinces. This distribution was so constant that it might have been considered a constitutional convention rather than simple governmental practice. The convention, if there was one, was broken, however, in 1978 with the appointment of Mr. Justice McIntyre, a British Columbia appellate court judge, to fill the vacancy caused by the retirement of Mr. Justice Spence of Ontario.

Constitutional convention might have come into play in one other area of the Court's composition, that is, the chief justiceship. It is arguable that from 1949 to 1974 two conventions existed: first, that the chief justiceship alternated between English Canadian and Quebec justices;[24] secondly, that a vacancy in the chief justiceship was filled by the most senior puisne judge.[25] The second convention, if it existed, was broken in 1974, when Mr. Justice Laskin, one of the most junior puisne justices, was appointed Chief Justice.

A combination of statutory provision and governmental practice determines the actual appointees to the Supreme Court. Section 4 of the Supreme Court Act provides that the federal government (in practice, the Cabinet) has the exclusive power to appoint its judges. No other institution or interest group, including the Senate, the House of Commons, provincial governments, or the Canadian Bar Association, has a formal role in the appointment process. On an informal basis, the federal Minister of Justice will often consult both the government of the province from which the appointee will come and its organized bar before making an appointment. But this consultation is optional, and the consent of the government or institution consulted is not required.

The only restriction on the federal government's power of appointment is imposed by section 5 of the Supreme Court Act, which provides that an appointee must have been a superior court judge or lawyer in a province for ten years before his appointment to the Supreme Court of Canada. This means that all the justices of Canada's highest court will be trained and experienced in Canadian law.[26]

Beyond the unifying factor of legal training and experience, a few generalizations can be made about the background of the judges of the Supreme Court of Canada. First, the Supreme Court is *not* primarily composed of former politicians or even of 'men of affairs' who were active in the public affairs of the country, although not in an elected capacity. Since 1949[27] only two of the nineteen appointees to Canada's highest court have had direct political experience.[28] This contrasts sharply with the appointees to the United States Supreme Court, which has traditionally included a high proportion of judges with substantial government experience in either elected[29] or appointed[30] posts. It also contrasts with the European Court of Justice, where almost all the judges have held important elected or appointed offices in their home countries.[31]

The Supreme Court of Canada *is* composed of judges with a wide range of background and experience. Most of the appointees of the 1950s and early 1960s were lawyers with similar backgrounds, that is, long experience in big-city corporate practice. In the 1970s and 1980s, however, the backgrounds of appointees have been more diverse. Of the nine appointees chosen between 1970 and 1980, eight had experience in the practice of law,[32] but three had pursued serious academic careers,[33] and four had substantial connections with government service.[34]

The final trend relating to the Court's composition that can be detected is a strong inclination towards the appointment of men with previous judicial experience. Seven of the nine appointees since 1970 were men with substantial previous judicial experience in provincial superior courts.[35]

Jurisdiction

The jurisdiction of the Supreme Court of Canada, set out in the Supreme Court Act, is entirely statutory. The Court's jurisdiction is final, comprehensive, primarily appellate, but occasionally original.[36] The Court's jurisdiction is also largely discretionary: since 1975 the Court has had almost complete control of its own docket.[37]

What use has the Court made of this comprehensive and, since 1975, largely discretionary jurisdiction? One major trend is clearly discernible: the Court's traditional emphasis on private law cases is rapidly diminishing.[38] Historically the Supreme Court of Canada, unlike the highest courts of most other federations,[39] has devoted a great deal of attention to such traditional private law areas as property, tort, contract, commercial relations, insurance, estates, and trusts. There were probably two main reasons for this attention. First, and most important, until 1975 the Supreme Court Act itself included financial provisions that gave litigants an automatic right of appeal in many of these cases.[40] Thus the Court was compelled to hear a large number of cases raising private law issues. Secondly the political creators of the original Supreme Court and, presumably, many of the judges on the Court through the years hoped that the Court's comprehensive and integrated jurisdiction would hasten the development of greater uniformity in most areas of Canadian law, especially private law.[41]

Today neither of these reasons for the Court's historical emphasis on private law cases is as compelling as in years past. The Court is not bound to hear a wide range of private law cases, and the current movement towards decentralization in the country may have encouraged the Court to draw back, perhaps unconsciously, from making any aggressive attempts to unify the law, even private law.

In addition to the decreasing importance of the two traditional reasons for the Court's emphasis on private law cases, a number of important developments in Canadian political life have thrust the Court into a more active and visible role in the public law area. First, federal statute law has increased greatly in recent years, as have administrative and adjudicative institutions to handle this new law. This growth has given rise to voluminous litigation of both a jurisdictional and substantive nature. The Court has shown itself to be quite willing to hear appeals in this area of law.[42] Secondly there has been a marked growth in the Court's role as interpreter of the Constitution. There can be no doubt that in the 1970s the Court dealt with more,[43] and more important,[44] constitutional cases than in any previous decade of its existence. There are a number of reasons for this growth. First, all eleven governments have enacted civil liberties and human rights legislation. These statutes have provided the Court with a focus for considering the relationship between government and citizens.[45] Secondly different branches of a single level of government have occasionally come into conflict and required judicial resolution of their differences.[46] Thirdly, and most important, in the 1970s the Court was regularly called upon to perform the traditional role of final courts in federations, that is, to resolve jurisdictional disputes between two levels of government. This is the constitutional function that occupied the Court's attention for most of the 1970s after several decades of relative inactivity in this area.

The reasons for increased judicial activity in the field of federal-provincial relations are diverse and involve both political and institutional considerations. The Supreme Court of Canada has always played an important, although limited,[47] role in resolving disputes between the two levels of government. The magnitude of that role will depend in large part on the incidence of deadlock in the political system. Political deadlock can occur if either of two factors is present in the political system or if both are present: first, if governments become aggressive and attempt to expand their jurisdictional boundaries; secondly, if governments take a classical view of the nature of federalism and insist on the setting and maintenance of firm, clearly defined, jurisdictional boundaries by an impartial third party, instead of accepting a large measure of overlap of legislative authority and trying to work out consequent conflicts by direct intergovernmental negotiation and compromise.

In the 1970s these two factors converged to create more political deadlock and, therefore, a larger role for the Supreme Court than in previous decades. A number of provincial governments, especially those of Quebec, Alberta, and British Columbia, acquired a confidence and pride that led them to enact legislation that challenged some of the traditional prerogatives of the federal government.[48] At the same time many of the provinces thought they detected a vast intrusion by the federal government into areas of provincial jurisdiction. Provincial politicians of all parties and from all parts of the country decried this alleged federal insensitivity to provincial jurisdiction.[49] Although a strong argument can be made that the Trudeau government tried to be faithful to the tenets of political negotiation and compromise espoused by its Pearson predecessor,[50] the provinces simply did not see things that way. Because they were unhappy with a perceived lack of consultation and compromise by Ottawa, and because they thought that the federal intrusions were substantial in number and significant in quality, they began to focus, to some extent, on the Supreme Court of Canada as a possible forum for airing their grievances and gaining redress.[51] This provincial focus on the Court was paralleled by the willingness of the Trudeau government to refer to it important constitutional questions,[52] and to become involved in constitutional disputes between provincial governments and private citizens if it thought that important national interests were at stake in the litigation.[53]

This collective rush to judgment by both levels of government may have been further encouraged by some institutional changes within the Supreme Court of Canada itself. During the 1970s the Court broadened its rules of standing and intervention in order to permit a greater range of people to challenge legislation on constitutional grounds.[54] Additionally, for the first time in the Court's history, a highly visible and respected constitutional expert was appointed to the chief justiceship. This may have subtly encouraged governments and private litigants to turn to the Court for resolution of constitutional disputes.

Because the Court is now such a visible and important actor in Canada's political life, it is not surprising that its reform has been a consistent item on all recent agenda for constitutional reform. It is appropriate to turn, therefore, to a consideration of the various models of constitutional reform and their potential effects on the Court and on the administration of justice in Canada.

Constitutional Reform Model 1: Revised Federalism

Of the four models of constitutional reform, revised federalism is the most difficult to define simply because the revisions can take so many forms. For the purposes of this article, I shall discuss four models of revised federalism and assess their consequences for the Supreme Court of Canada. These models are:

(1) A revised federalism that emphasizes the rights of individuals and restrains the freedom of both levels of government to deal as they wish with their citizens

(2) A revised federalism that emphasizes political, not legal, mechanisms for resolving disputes between the two levels of government

(3) A revised federalism that emphasizes legal, not political, mechanisms for resolving disputes between the two levels of government

(4) A revised federalism that emphasizes a redistribution of legislative powers. This redistribution could be in favour of the central government because extra value is attached to factors of nationalism in the country. Or the redistribution could tend to

decentralize because increased importance is attached to factors of provincialism, regionalism, or dualism.

It is important to emphasize at the outset that except for Models 2 and 3, these models do not exclude one another. Indeed it is highly likely that realistic constitutional change will contain elements of Models 1 and 4 as well as either 2 or 3. New constitutional provisions concerning civil liberties (Model 1), mechanisms for resolving intergovernmental disputes (Models 2 or 3), and the allocation of legislative powers between the two levels of government (Model 4) can, and probably will, co-exist and complement one another in a new Canadian constitution.

Emphasis on the Rights of Individuals

There is very little constitutional protection for individual civil liberties in Canada.[55] There is a large volume of legislative protection at both the federal and provincial levels, but all the legislation can be amended or repealed at any time. Throughout the 1970s the federal government consistently proposed that a written bill of rights be entrenched in the Constitution.[56] This implies that in Canada's federal system, the legislative powers of both levels of government would be curtailed in areas that impinge on the fundamental rights of the citizen. Presumably the tension between government policy and individual rights would continue to be resolved by the courts and ultimately by the highest court. The only difference would be that the courts would be called upon to interpret a constitutional, as opposed to a statutory, document in deciding those cases.

Theoretically this difference would not compel any changes in the Court's status, composition, or jurisdiction. The only real difference that could arise might be in the *use* the Supreme Court made of its jurisdiction to interpret an entrenched bill of rights. It has been suggested that the Court might interpret the entrenchment of a bill of rights as a signal to it to be vigilant in the protection of the rights enshrined in the Constitution.[57] The result might be a Court deeply involved, as the United States Supreme Court has been, in the assessment and invalidation of legislation on civil liberties grounds.

Emphasis on Political, not Legal, Mechanisms for Resolving Disputes

Historically most federal-provincial disputes have been settled in the political arena. 'Co-operative federalism' has been the underlying philosophy of most of the actors in the political system. But a second philosophy, 'co-ordinate federalism',[58] has also had a place in the national dialogue. When this second philosophy is in the ascendant, the highest court will be called upon to resolve many of the pressing federal issues of the day. In addition, irrespective of the dominant political philosophy of federalism, the Court is often moved to adjudicate federal issues by the side-winds of constitutional challenges raised by private litigants.

Many people, myself included, are unhappy when a large number of federal issues are resolved in the Supreme Court of Canada. But only one person[59] has proposed a logical solution that, if adopted, would be completely effective in disposing of the problem. The proposal is that the Supreme Court of Canada take almost no part in resolving federal-provincial disputes. All such disputes would be resolved in the political arena, for "a federal system is precisely the kind of relationship for which an external umpire may not be necessary and in which the better technique for managing conflict is continual negotiation and political compromise."[60] The supporting arguments can be briefly stated. First, there is no textual support in the BNA Act for judicial review of legislation on jurisdictional grounds.[61] Secondly there is no compelling theoretical reason for judicial review.[62] Thirdly the power-conferring sections of the BNA Act contain specific words that are largely irrelevant today in the context of the new and massive problems facing an urban industrial society. Hence the Supreme Court, when it decides federal cases, is in reality creating new constitutional law. Finally, the Court has shown itself to be incapable of doing this well. For these reasons, "instead of trying to redesign the Supreme Court to make it a better constitutional umpire, let's try to reduce as much as possible the significance of this function in its work."[63]

The practical consequences for the Court of this proposal have not been spelled out in detail, but they are reasonably easy to discern. No changes either in the Court's status or in its composition would be required. Those who advocate providing for the Court's position in the Constitution or giving the provinces a formal voice in the selection of judges do so to enhance the Court's legitimacy as umpire of the federal system. If the Court were not to play this role, a guaranteed constitutional status and intergovernmental appointment process would not be required.

The real implications of this proposal relate to the Court's jurisdiction. The Constitution or the statute creating the Court would have to abolish the Court's reference jurisdiction and prohibit the Court from hearing all constitutional challenges initiated either by governments or by private litigants.

In my opinion the arguments in support of this proposal can be rebutted, and the proposal itself is undesirable on its merits. The historical argument based on the lack of textual support for judicial review in the BNA Act is weakened by the much more significant historical fact that a final court has actually exercised that power for 105 years. In addition the admittedly broad words in the power-conferring sections of the BNA Act do not imply that the Court creates new constitutional law every time it decides a case.[64] For over 100 years the Court has poured meaning into these words. This judicial interpretation has shaped the original power-conferring words and phrases in relation to one another so that they have afforded guide-lines for new problems of legislative power distribution arising from social change. Consequently both political and judicial decision making on federal issues is not *ad hoc*; rather it is cumulative and very much dependent on, and usually faithful to, what has gone before. This process should not be uprooted lightly on the misconceived assumption that constitutional interpretation by the courts is a purely eclectic exercise.

Finally, even if one concedes that the Supreme Court of Canada has not been a particularly effective umpire of the federal system,[65] there are still some powerful arguments against abolishing its jurisdiction in constitutional cases. Chief among these is the likelihood that those governments with strong financial positions would win most disputes if the resolution of federal-provincial disputes were left to the political system. Political settlement of all constitutional disputes might be fine for Ottawa, Ontario, and Alberta. But would Manitoba and New Brunswick ever win any important disputes? "Might is right" is a perfect description of a schoolyard tussle with unequal participants and no umpire. I fear it would be an equally apt description — perhaps epitaph — of a federal system consisting of eleven unequal participants if there were no external umpire.

In addition any system that relies completely on the political process to resolve disputes will be inherently unstable as the strengths and weaknesses of the various governments ebb and flow. What Ottawa or Ontario won in the 1970s, Alberta may win in the 1980s, and Newfoundland in the 1990s. And Manitoba and New Brunswick may never win. The point is that decisions in the political arena are often based on 'clout' and expediency, less often on principle and altruism. The courts can temper this instability because they are disinterested non-participants and can view the constitutional problem from a different (not necessarily better) perspective that emphasizes principle, consistency and, perhaps, the longer view.

This brings me to my final point. The proposal described above derives in essence from three propositions: first, the Court is a major actor in the sphere of federal-provincial relations; secondly the Court has acted its role poorly: its decisions have been, on balance, poorly reasoned and undesirable on their merits; thirdly these bad decisions are *final* decisions: they become cemented in the political structure of the country and prevent the political actors from adopting wise policies. Therefore, it is concluded, the Court should be excised from the federal process.

All three propositions, in my view, are basically incorrect. The Court plays only a supporting role in federal-provincial relations. Although its role has become more significant since 1970, the life-blood of Canadian federalism is still decision making in the political arena. The Court's role should not be exaggerated. It does speak on federal-provincial relations. But its voice is not heard on every issue, nor is the Court often the most important speaker. The Court does not create the dialogue. Most of the dialogue is between the governments themselves.

Secondly I do not believe that the Court's constitutional decisions have been as bad as has been suggested. Although the Court's reasoning has often been weak, I suggest that many of its decisions during the 1970s have been correct and quite acceptable to most Canadian politicians and citizens.[66]

Thirdly the Court's decisions are final only in a theoretical sense. In reality a decision by the Supreme Court of Canada is only one statement in a continuous conversation among citizens, governments, and the Court. Citizens speak, governments respond, and the Court evaluates. But the Court's evaluation is not the final word. It invites a further response, either approval or condemnation, from citizens or governments. And if that further response is condemnation, there are tools available for altering the Court's position. The most recent illustration of this process is in the area of communications. New technology created cable television; citizens demanded access to it; governments passed laws concerning it; the laws conflicted, and governments quarrelled; and the Supreme Court of Canada 'resolved' the dispute by evaluating the laws against the constitutional yardstick provided by the BNA Act.[67] But was the Court's resolution final? It was not. Quebec and Saskatchewan were unhappy with the result, and Ottawa indicated a willingness to negotiate further. The political process swung into action again. The Court's decision was clearly a part of the policy-making process, but its decision was neither the final nor the most important one in that process.

My conclusion, therefore, is that one can hope for political resolution of most constitutional issues, and one can structure the political system with that goal in mind. But considerations of tradition and merit point towards a role for the Supreme Court as well. That role has been, and should be, secondary and supplemental to the political process. But it is no less valuable because it is limited.

Short of the radical proposal that has been discussed above and definitely in the realm of realistic constitutional reform are proposals calling for reform of important federal institutions such as the Senate[68] or of important federal-provincial institutions such as the First Ministers' Conference.[69] Proposals to make the Senate a forum in which provincial views are heard before federal legislation is enacted or to constitutionalize the First Ministers' Conference are designed to ensure that there is regular and formal federal-provincial consultation before the federal government enacts legislation in areas of substantial provincial interest. If this consultation-and-consent process worked well, one of the possible side-effects might be that fewer federal-provincial jurisdictional disputes would reach the Supreme Court of Canada. Presumably, in a reconstituted Senate or in a formalized First Ministers' Conference, two of the usual questions to be asked would be, first, whether the proposed federal legislation is *ultra vires* (a question of *intrusion*) and, secondly, whether the legislation, even though constitutional, conflicts with existing provincial legislation (a question of *overlap*). If the result of discussions based on those two questions were the withdrawal or alteration of either proposed federal legislation or existing provincial legislation, then, presumably, fewer cases might go to the Court.

It is important, however, not to exaggerate the impact that a reconstituted Senate or a constitutionalized First Ministers' Conference might have on the constitutional work load of the Court. Very few constitutional cases today involve the two levels of government as opposing principal parties. The usual constitutional case involves a private individual or corporate body and a single government as principal parties, with the other level of government acting as an intervener, usually on the side of the individual or corporation. A reconstituted Senate or more important First Ministers' Conference or any other reformed federal institution would have little, if any, effect on the number of constitutional cases in which a private party challenges legislation. The only substantial effect that the reform of such institutions might have is a significant reduction in the widespread, almost pro forma, decision by all governments to intervene *against* the validity of the legislation being challenged. If more emphasis were placed on political resolution of federal-provincial disputes, especially if political resolution were attempted even before new legislation was enacted, then, presumably, many problems of intrusion and overlap would be solved to the satisfaction of the governments. This should, in turn, make each of them less inclined to intervene in constitutional cases to contest the validity of legislation enacted by the other level of government when that legislation is challenged by a private party.

Emphasis on Legal, not Political, Mechanisms for Resolving Disputes

This model of revised federalism, like the previous one, does not deal with a redistribution of powers. Rather, it concerns the proper method for adjudicating disputes, whatever the allocation of legislative powers. Unlike the previous model, however, this model would put a premium on legal, as opposed to political, resolution of constitutional disputes. The usual vehicle proposed for giving effect to this philosophy is a constitutional court because, it is generally assumed, such a court would hear a larger number of constitutional cases than the existing Supreme Court hears at present. Because proposals for the creation of a separate constitutional court are so closely linked with Quebec's perception of Canadian history and its own needs, I shall postpone discussion of the concept until I come to deal with special status for Quebec.[70] But that discussion is appropriate to a 'revised federalism' as well, and should also be considered here.

Emphasis on Redistribution of Powers

Most proposals for revision of Canadian federalism include recommendations for redistributing legislative powers between the federal and the provincial governments. These recommendations may be divided into broad categories: first, recommendations for a redistribution of powers in favour of the federal government (centralization), flowing from considerations of *nationalism*; secondly recommendations for a redistribution of powers in favour of the provinces (decentralization), flowing from considerations of *provincialism* or *regionalism* or *dualism*.[71]

Before beginning this discussion,[72] one general point needs to be made. Irrespective of the direction a new distribution of powers takes, it seems indisputable that the Constitution should provide for the status (that is, the existence and independence), the composition (that is, the size, distribution of judges, and appointment procedures), and the jurisdiction of the Supreme Court of Canada. As long as the Court plays *some* role in the resolution of federal-provincial disputes, it is illogical in theory and undesirable in practice to allow a single level of government to legislate unilaterally concerning it. This point was made eloquently by the Tremblay Commission in 1956[73] and has been echoed since by every major government[74] and research group,[75] and by many academics. Consequently section 101 of the BNA Act and the entire Supreme Court Act should be repealed and replaced by constitutional provisions establishing the Court's status, composition, and jurisdiction. The significant question is not *whether* the Constitution should provide for these matters; rather, it is *what balance* should be struck between federal and provincial interests in the constitutional provisions relating to the Court.

Increased centralization flowing from considerations of nationalism

Increased centralization flowing from a redistribution of powers in favour of the federal level of government is so far outside the realm of realistic constitutional reform that it is not necessary to dwell on the consequences for the Court of reforms in that direction.[76] Presumably, however, if Canada were to become a more centralist state, there could be no serious objection to constitutional provisions entrenching the current situation whereby the members of the Court are appointed by the federal government acting unilaterally.

Increased centralization in a different context that does not involve distribution of powers is, however, a possibility. If a new constitution included entrenched protection for individual liberties and some group rights, such as those pertaining to language and education, then there would be uniformity in these areas; variable federal and provincial legislative responses would not be permitted.[77] This could have an important impact on the Supreme Court of Canada, which would be charged with interpreting these enacted protections. The Court might well take the fact of entrenchment as a signal to become deeply immersed in civil liberties issues.[78]

Increased decentralization flowing from considerations of provincialism and regionalism

The present status and composition of the Supreme Court of Canada are based on two historical assumptions. First, the Fathers of Confederation clearly intended to create a federation in which the distribution of powers was tilted heavily in favour of the federal government.[79] Secondly, if federal-provincial disputes did arise,[80] they were to be resolved through the political process, especially through the device of federal disallowance of provincial legislation. Against this background of a dominant federal government and political resolution of disputes, it was not surprising that the Supreme Court of Canada was created with a limited role as umpire of the federal system.

The performance of the Supreme Court of Canada and, especially, the Privy Council quickly altered both these assumptions. These courts showed themselves willing to hear and decide constitutional issues, and their actual decisions noticeably expanded provincial jurisdiction. Today a major decentralization of powers would probably confirm the judicial alteration of the two assumptions mentioned above, with important consequences for the present Court. For example, the BNA Act contains at least four sections that allow the federal government, in effect, to alter unilaterally the distribution of powers in Canada. These powers are the disallowance, emergency, declaratory, and spending powers.[81] If any or all of these powers were abolished or narrowed in a new constitution, the change would emphasize the equality and independence of both levels of government. It would also mean that, in some disputes, the federal government would not have ultimate unilateral weapons to use. These disputes would have to be resolved by an impartial third party, probably the Court, through an interpretation of the remaining heads of sections 91 and 92 of the BNA Act. In such a decentralized federation that emphasized the independence of both levels of government and thereby potentially expanded the role of the Court as umpire of the federal system, changes might be required in the Court itself in two areas. Those two areas are the procedures for appointing judges to the Court and the Court's jurisdiction.

Appointment procedures. The current method of appointing judges to the Supreme Court of Canada does not reflect a true federation. Although provincial governments and interested groups such as the Canadian Bar Association are regularly consulted about such appointments, the legal position is that the federal government alone is responsible for making appointments.[82] This practice is untenable in a federation where the final court is called upon to adjudicate disputes between the two levels of government. It seems indisputable that both levels of government should participate in the appointment process. A joint appointment process would not be designed to make the judges delegates of the appointing governments. The Canadian tradition of judicial independence is too deeply rooted to give credence to any such design. Rather, the reason for joint appointment is simply to make the Court symbolically more acceptable by ensuring that impartiality is evident in both form and reality.

Once the departure point of joint appointment is accepted, the difficult question becomes: How should this dual participation be structured? This question, in turn, subdivides into two more specific questions: What should be the balance between federal and provincial governments in the appointment process? And what should be the mechanism for recording the provincial position?

The first question is easily answered. Most advocates of constitutional reform opt in favour of equal participation. This is usually expressed in terms of federal nomination and provincial confirmation of judges' appointments.[83]

The second question has given rise to a great variety of responses. Those responses, however, can be arranged in two broad categories: first, those that would give a provincial government or some part of it (usually the provincial Attorney General) a direct voice in the appointment process; secondly those that would allow the provincial voice to be heard indirectly through the national institution (usually a reformed Senate) that is most sensitive to provincial interests. The Victoria Charter is the clearest example of the first category; proposals advanced by the Government of British Columbia, the Task Force on Canadian Unity, the Canadian Bar Association, and the federal Progressive Conservative Party exemplify the second category. I shall consider each of these models, assuming for purposes of discussion that a vacancy has occurred on the Court and will be filled by a judge from Ontario.

The appointment system proposed in the Victoria Charter[84] would require that the Attorney General of Canada confer, and reach agreement, with the Attorney General of the appropriate province of residence of the prospective judge prior to the latter's appointment. Only the federal Attorney General, however, could propose nominees. If the two Attorneys General could not agree on a nominee, the federal Attorney General would have the right to opt for a nominating committee consisting either of the eleven Attorneys General in Canada or of himself and the provincial Attorney General involved, plus an impartial chairman. Names could be submitted to either kind of nominating committee only by the federal Attorney General and only from the list he has already proposed to the provincial Attorney General for approval. The nominating committee would then make a recommendation to Cabinet that, presumably, would be accepted.

Although the Victoria Charter method has the merit of allowing both levels of government to participate in the appointment process, it suffers from three major defects. First, it is cumbersome and probably time consuming. Secondly provincial participation in the process could be quite limited or even illusory. Assume, for example, that the federal government was strongly inclined to appoint Adams, an Ontario lawyer, to the Supreme Court. Assume also that the Attorney General of Ontario disapproved. The Attorney General of Canada could then put forward the names of two very weak candidates, Burns and Cobb. The Attorney General of Ontario would, correctly, disapprove of them. The federal government could then submit these three names and no others to the nominating committee. The likely result? Adams is appointed, exactly as the federal government wished in the first place.[85]

Thirdly, and most important, the Victoria Charter model raises the rather unseemly prospect of judicial appointments reached through a process of intergovernmental bargaining and arbitration. It is important that the provinces participate in judicial appointments if the Supreme Court is to take part in the resolution of federal-provincial disputes. But that provincial participation should be generalized (that is, all provinces should participate) and structured to emphasize considerations of merit, not politics. The Victoria Charter model permits direct participation by only one provincial government. In addition, by limiting that participation to the expression of an initial opinion by a single provincial Cabinet officer, followed by arbitration among politicians, the model is likely to entail a greater emphasis on political considerations than is desirable.

Most of the defects of the Victoria Charter model are remedied in the second model for recording provincial views. That model, which now seems to have widespread support,[86] calls for a nomination by the federal government that is to be confirmed by a reconstituted Senate whose membership consists of persons either appointed by or elected in the provinces.[87] In my view this model creates a useful mechanism for structuring provincial participation. Nomination by the federal government is appropriate because only the national government has an over-all view of the state of the law and the legal community in the country. In addition someone has to make an initial determination of the province from which the next judge will come. The federal government can do this better than provincial governments. Confirmation by a reconstituted Senate then allows the provinces to participate in the process, but in a way that will emphasize general provincial participation and, probably, considerations of merit rather than politics.[88]

Jurisdiction. The concept of federalism requires that there be at least two separate, independent, legislative bodies. Canada is faithful to that concept. But, recognizing that courts are also important law-making agencies, logic alone would require that there be two separate, independent, court systems as well, one to interpret federal laws, the other to interpret state or provincial laws. The United States has adopted this logical structure; Canada has not. In Canada the court structure is basically unitary with a single hierarchy of courts in each province interpreting all laws.[89]

Some proponents of a more decentralized Canada do not limit their proposals to a greater devolution of legislative powers in favour of the provinces. They also recommend a devolution of judicial powers in favour of the provincial courts. Their basic proposal is the abolition of appeals to the Supreme Court of Canada and the vesting of final appellate authority in the provincial appeal courts in provincial law cases. This proposal is heard most often in Quebec, where there is concern that the Supreme Court of Canada, dominated by English Canadian judges trained in the common law, will not understand the civil law system of Quebec and may, therefore, render decisions that are wrong or that dilute the purity of that law. But the proposal is not limited to Quebec. There have been some English Canadian students of the Court who would like to generalize the Quebec proposal and abolish appeals to the Supreme Court of Canada in provincial law cases arising in all ten provinces. For purposes of analysis, it is *not* possible to treat the Quebec and English Canadian proposals together. The Quebec proposal is not simply a single example of a broader proposition applicable to all ten provinces. The reasons for the Quebec proposal are so different in kind from the arguments advanced in the common law provinces that separate treatment is warranted.

Abolition of Appeals by the Common Law Provinces to the Supreme Court of Canada in Provincial Law Cases

The proposal to abolish appeals to the Supreme Court of Canada in provincial law cases arising in the nine common law provinces takes two forms: first, the outright abolition of such appeals;[90] secondly, and less radically, giving each of the nine provinces the option to withdraw appeals from the Supreme Court of Canada in provincial law cases.[91]

A number of arguments are advanced in support of these proposals. First, the logic of pure federalism requires that all law making, both legislative and judicial, be divided cleanly between the two levels of government. A largely unitary court system such as Canada's is a denial of the theory of federalism in the judicial sphere. Secondly there is no explicit constitutional requirement that the Supreme Court of Canada exercise appellate jurisdiction in provincial law matters. According to one of Canada's foremost students of the Court: "Canada's written Constitution, unlike that of virtually every other federal state, has provided no explicit formulation, positive or negative, of the scope of the national supreme Court's appellate jurisdiction."[92]

Thirdly, aside from considerations of logic and constitutional text, it can be argued that there are solid policy reasons for the abolition of appeals to the Supreme Court in provincial law cases. Appeals to the Supreme Court of Canada are expensive and time consuming. Since almost all provincial law cases that reach the Court have been adjudicated at least twice and often three times in provincial courts, it is questionable whether the advantages of a second or third appeal outweigh the cost and time involved.

Finally, and perhaps most compellingly, proponents of the abolition of appeals contend that it is illogical and undesirable to allocate jurisdiction to the provincial Legislatures in some areas in the expectation that those Legislatures will use the jurisdiction to enact diverse responses to local problems, and then create a single national court that might try to achieve uniformity through its interpretation of provincial laws. In other words, if the Supreme Court is allowed to interpret provincial laws, the result might be judicial dilution of the diverse laws which were the *raison d'être* for the creation of a provincial level of government in the first place. This view has been put forcefully as follows: "Let it be said that Quebec is not a province *tout comme les autres*. I quite agree — but with the addendum that none of them is. The life and people of New Brunswick do not duplicate those of Saskatchewan; Ontario and Newfoundland do not repeat each other. Each of the provinces has things in common with all of the others, things in common with some of the others, and things which are its own."[93]

Accordingly, since what "is fundamentally involved are the merits of provincial self-determination,"[94] the Supreme Court of Canada should not be allowed to diminish provincial sovereignty by becoming involved in the interpretation of provincial laws.

Although there is merit in some of these arguments, in my view the competing arguments in favour of retention of the comprehensive jurisdiction of the Supreme Court are more persuasive. The Supreme Court has interpreted provincial laws for over one hundred years. Considerations of history and tradition, therefore, compel that appeals to the Court in provincial cases be abolished only if there are no serious drawbacks to such a change. I think that there would be some serious adverse consequences.

First, there is no great desire in the nine common law provinces for the abolition of appeals to the Supreme Court of Canada in provincial law cases. The Government of British

Columbia probably reflected the views of all nine common law provinces when it stated:

> As far as the interpretation of provincial statutes in the common law provinces is concerned, British Columbia does not believe that the case for nine separate appeal courts exercising final appellate authority is particularly strong. Most of the provinces do not want or need nine different "common laws" in the country — which is what we might get if the Supreme Court of Canada could not play its current supervisory role. Whereas the special features of the civil law in Quebec require preservation and should not be diluted by inapplicable common law principles, a basic uniformity of interpretation of similar provincial legislation in the common law provinces is desirable. The existence of one national appeal court interpreting such legislation contributes significantly to the realization of that goal.[95]

British Columbia's view is really as old as Confederation. Section 94 of the BNA Act clearly indicates that the Fathers of Confederation foresaw a time when the laws of all the common law provinces would be uniform. British Columbia's view is also probably in the mainstream of opinion in the nine common law provinces, where most citizens are increasingly wary of the problems created by a multitude of conflicting legislation, particularly when that legislation relates to economic and commercial activity. As the Economic Council of Canada has stated: "There is abundant evidence that many Canadians believe, some quite strongly, that regulation by all levels of government has become more complex, more costly, and less effective than it should be."[96] Recognizing this widespread perception and also recognizing that a great deal of economic and commercial activity cuts across provincial boundaries, most Canadian provincial governments have actively tried to standardize many of their laws in these areas. It would be undesirable, therefore, to allow nine separate provincial appeal courts to undo at the judicial stage what the nine common law provincial governments are working to create at the legislative stage.[97]

Secondly the abolition of appeals to the Supreme Court of Canada in provincial law cases would create some serious jurisdictional problems. Did *Roncarelli* v. *Duplessis*[98] and *Gay Alliance Toward Equality* v. *Vancouver Sun*[99] raise a narrow issue of the interpretation of a provincial statute or a fundamental constitutional question? Did *Quebec North Shore Paper Co.* v. *C.P.R.*[100] and *Government of Canada* v. *McNamara Construction*[101] raise an issue of provincial contract law or of federal law?

Presumably, even if it is conceded that provincial law issues could be appealed only as far as the provincial appeal courts, there would have to be a mechanism for determining what constitutes a provincial law issue. The Supreme Court of Canada is the only realistic mechanism for doing this. But the process would be time consuming, expensive, and inefficient because the jurisdictional issue would have to be brought first to the Supreme Court of Canada for a determination of where the appeal should be heard.[102]

Thirdly, even if it were possible to identify a single issue as provincial or federal or constitutional, such a determination would not be particularly helpful in the growing number of cases that raise two or more categories of issues. In almost every area of our national life — consumer and corporate relations, labour relations, resource development, economic affairs, housing, urban affairs, land-use control, communications, immigration, administration of justice, to name a few — the economic and social frictions that give rise to political and legal controversy have a way of crossing jurisdictional boundaries, particularly ones that are over one hundred years old. The result of this fact of modern life is that each level of government feels compelled to enact legislative solutions to problems located, at least partially, in its jurisdiction. These legislative solutions overlap and conflict.[103] They also impinge cumulatively on the citizen who is trying to structure a private and professional life.

Take but one example, commercial activity: as a result of a survey made in 1979, the Ontario Law Reform Commission reported that 52 per cent of Ontario companies have sales offices in other provinces, and 37 per cent sell in excess of 40 per cent of their goods to other provinces. Only 10 per cent of the companies reported no extraprovincial sales.[104] What has been the consequence of this far-flung commercial activity? Not surprisingly there has been an immense growth of both federal and provincial legislation to deal with the rights and obligations of parties in the sales sector. According to the Commission:

> At the federal level there are . . . the Bank Act; the Bills of Lading Act; the Combines Investigation Act; the Consumer Packaging and Labelling Act; the Food and Drugs Act; the Hazardous Products Act; the Motor Vehicle Safety Act; the Textile Labelling Act; and, the Weights and Measures Act. At the provincial level, legislation of Ontario includes . . . The Bills of Sale Act; The Business Practices Act; The Consumer Protection Act; the Factors Act; The

> Mercantile Law Amendment Act; the Motor Vehicle Dealers Act; the Personal Property Security Act; and the Warehouse Receipts Act. Much of the post-war legislation is consumer oriented, but its impact frequently extends well beyond the law of consumer sales.[105]

To the businessman trying to sell his goods, all this legislation means that any legal problem with which he is faced will probably raise issues of both federal and provincial and, perhaps, constitutional law. This conclusion, that is, the reality of 'mixed law' in many situations, is not unique to the area of commercial activity. It is duplicated in almost every sphere of our national life.[106]

What, then, are the implications for the citizen of superimposing a dual court system on the picture of widespread 'mixed law' just described? If provincial appellate courts are to exercise final appellate jurisdiction in cases of pure provincial law, there are only two ways to structure final appellate authority in situations that raise provincial law issues in combination with other issues.

The first method is to confer on the Supreme Court of Canada final appellate jurisdiction in all 'mixed law' cases. This solution immediately presents the question: What should the Supreme Court do with the provincial choices? First, the Court could decide the provincial law matter for itself, without formal reference to the way in which the provincial appeal court had decided the issue when it was before that court as a pure provincial law question. The obvious flaw in this solution is that the Supreme Court might reach a different decision from the provincial appeal court on the provincial law matter. The implication of this eventuality is that a provincial law would have one meaning in a situation calling only for the interpretation of that law, but could have an opposite meaning in a situation calling for the interpretation of both the provincial law and a federal law.

The second solution, which has been adopted by the United States Supreme Court,[107] would require that the Supreme Court accept the interpretation put on a provincial law by the provincial appeal court, and then apply this interpretation in the 'mixed law' situation. There are two difficulties with this solution. First, it will not always be easy for the Supreme Court to determine precisely what a provincial appeal court has said about a provincial law. In a sense the Supreme Court will be required to make an interpretation of an interpretation of a provincial law. This is no mean feat! Secondly it is possible that any interpretation of a provincial law in its pure setting that is made by a provincial appeal court might not be useful or fair in a setting where provincial and federal laws interact in a single situation. For all these reasons it does not seem desirable to combine final appellate jurisdiction in the Supreme Court of Canada in 'mixed law' cases with provincial appellate jurisdiction in provincial law cases.

Unfortunately the second method for resolving the problems posed by 'mixed law' situations is even less useful. This second method would require at the outset an identification of the category of law presented by each issue in a case. Following this identification, each issue would be sent to the appropriate final appellate court: the provincial appeal court if the issue were provincial, the Supreme Court of Canada if it were federal or constitutional. The problem created by this method is obvious and immense: fragmentation of jurisdiction. Canada is familiar with the difficulties, both procedural and substantive, that are created when jurisdiction over a single problem is divided among a variety of courts. For procedural difficulties one has to look no further than the new Federal Court to realize that fragmented jurisdiction poses numerous and complex jurisdictional issues that deflect the attention of litigants and courts from the merits of a case.[108] For substantive difficulties, the field of family law presents a frightening picture of the injustices and inefficiency that result from fragmented jurisdiction.[109] Although the problems posed by the creation of the Federal Court and the arrangement of jurisdiction in family-law matters relate to fragmented jurisdiction at the trial level, identical procedural and substantive difficulties would arise if appellate jurisdiction were fragmented.

My conclusion, therefore, on this third argument, is that if appeals in pure provincial law cases were given to provincial appeal courts for final determination, substantial and complex problems would be created in cases that raise provincial law questions in combination with other questions. If the Supreme Court of Canada were given jurisdiction in these 'mixed law' cases, it might have difficulty applying the interpretation given to a provincial law by a provincial appeal court; alternatively, the Supreme Court might give its own interpretation of the provincial law, which might conflict with that given by the provincial court. If this happened, the provincial law would mean one thing in cases where it stood alone, but something different if it were part of a broader legal controversy. On the other hand, if all the issues in a 'mixed law' case were identified and then turned over to the appropriate appeal court, the result would be jurisdictional fragmentation with inherent procedural complexities and substantive injustices. Thus there is no meritorious solution to the 'mixed law' problem if appeals to the Supreme Court of Canada are abolished in provincial law cases.

Moving away from jurisdictional considerations, I fear that granting final appellate jurisdiction to provincial appeal courts is likely to lead to less just results in some areas of the law than does the present appellate framework. Civil liberties and tort[110] law come to mind as two examples.

Mr. Justice Holmes of the United States Supreme Court once declared: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."[111] Holmes was expressing his view that the state level of government, with its proximity to the local passions and prejudices of ordinary citizens, would be more inclined to disregard individual liberties than would a national government that must balance all the diverse interests in a society. I share this view that national governments are better protectors of individual liberties than are local governments, and I would add the proposition that a national court usually promotes liberty better than local courts.

Historically these propositions about national governments and national courts have been true in Canada. The worst legislative treatment of minority groups has occurred in provinces: the treatment of Chinese and Japanese Canadians in British Columbia, of Hutterites in Alberta, and of Jehovah's Witnesses in Quebec, to name but three examples. In addition, at times in its history the Supreme Court of Canada has shown great sympathy for individual liberties. Its decisions throughout the 1950s are the best example of this sympathy.[112] Unfortunately, in the 1970s neither the national government nor the national court was particularly attuned to individual liberties. The worst transgressions of those liberties in the political arena occurred at the national level in the 1970s; the invocation of the War Measures Act and the excesses of the national security services are the clearest examples. This lack of respect for individual liberties at the level of national politics has been paralleled by a singularly remarkable lack of concern for those liberties in the national court.[113]

Yet, in spite of the fact that provincial Legislatures and provincial courts are now generally more sympathetic to civil liberties issues than the federal government and the Supreme Court of Canada, I believe that, in the long run, the reverse is more often true. Local governments and local courts are probably more disposed to respond to the shifting views of the local community. If those views incline against individual liberties or minority interests, then a court that reflects them could do serious damage to the fabric of society. A national court may not respond as quickly to local public opinion because it must understand and reflect national views. The result is likely to be greater protection for individual liberties because it is improbable that the views of an entire nation will coalesce easily against individual liberties and minority groups.

Tort law presents a second area in which the lodging of final appellate jurisdiction in provincial appeal courts might work substantive injustice. Imagine a man in Halifax who takes medicine prepared in Toronto.[114] The medicine is defective, and this results in serious injury to the Haligonian. He sues the manufacturer in the Nova Scotia courts. Because the issue is one of pure provincial law, the final appeal is taken to the Nova Scotia Court of Appeal. Imagine that the Court of Appeal dismisses the plaintiff's claim because, in its view, a tort is committed where the wrongful act occurred. In this case the wrongful act occurred in an Ontario laboratory. Since, therefore, the tort was not committed 'within the province', the Nova Scotia Court of Appeal decides that its civil procedure rules do not permit it to hear the case. Viewed in isolation, this result may be neither surprising nor unfair. But that conclusion is valid only if the Ontario Court of Appeal adopts the same rule as the Nova Scotia court. If it does, then our injured Haligonian will have a remedy in Ontario. But what happens if the Ontario rule is that a tort is committed where the injury occurs, in this case, Nova Scotia? Two rules, each supportable on its own terms, have converged to create a thoroughly unjust result.

In my view the Supreme Court of Canada can play a useful role here, in an area of pure provincial law. Provincial appeal courts are probably more inclined to look internally at their own previous case law than externally at case law in other provincial jurisdictions before interpreting a provincial law. Thus they may not easily become aware of the injustices that flow from disparate provincial rules. But the Supreme Court of Canada has a broader vision. When it exercises its jurisdiction in provincial law cases, it should have no hesitation in undertaking an extended comparative study of various provincial rules. If it does this, the Court should quickly identify the anomalies and injustices created by conflicting provincial rules and then enunciate a rule that resolves them. In fact this is precisely what happened in the example discussed above. The Supreme Court recognized that conflicting 'place-of-acting' and 'place-of-injury' rules worked injustice in some cases and, in *Moran* v. *Pyle*, enunciated a new rule that appeared to allow a plaintiff to bring a tort action in any jurisdiction where a substantial component of the tort occurred.[115]

Finally, I believe that a final court with a comprehensive and integrated jurisdiction serves two important symbolic functions in a federal society. First, as the Canadian Bar Association Committee on the Constitution pointed out, "it is important that the highest court in the land be seen as not above considering ordinary problems of everyday life from time to time."[116] If the Supreme Court's jurisdiction in provincial law cases were abolished, then the citizen would *never* have access to the highest court, with presumably the best judges in the country, in precisely those areas of greatest concern to him, that is, the consequences of a house sale, a commercial contract, or an automobile accident. Secondly, as the Task Force on Canadian Unity pointed out, the Court can serve a broader symbolic function:[117] it can serve as an illustration, in one area of our national life, of good people from all regions of the country coming together, pooling their diverse philosophies and experiences, and ultimately creating policy that is better because of the exchange of ideas among them.

Abolition of Quebec Appeals to the Supreme Court of Canada in Provincial Law Cases

Most of the arguments against abolishing appeals to the Supreme Court of Canada in provincial law cases coming from the nine common law provinces apply with equal force to Quebec. If appeals in Quebec's civil law cases were abolished, the same problem would arise of determining what constituted a civil law issue. Additionally many situations relating to such areas as bankruptcy, administrative law, taxation, and commercial law raise civil law issues in combination with federal and constitutional issues.[118] The 'mixed law' situation is just as much a reality in Quebec as in the rest of Canada.

But, in spite of many similarities, the proposal to abolish appeals to the Supreme Court of Canada in Quebec civil law cases differs in kind from the proposal concerning appeals from the common law provinces. English Canada has never feared that the Supreme Court would distort the purity of provincial common and statute law. However, because of the deep historical and conceptual differences between the common law and the civil law, that is precisely the fear of many French Canadian lawyers and academics. According to the Canadian Bar Association Committee on the Constitution: "They underline that not only are Quebec's legal rules different but that the basic civilian[119] approach differs profoundly from that of the common law. They are concerned that common law judges might subconsciously misapply the civilian approach and gradually undermine the civil law system. They note that civil law cases could be determined by a majority of common law judges untrained in the civil law, or even by a minority of common law judges concurring with a single civil law judge on a five member panel."[120] This fear is as old as the first bill proposing the creation of the Court[121] and has been echoed by most prominent contemporary Quebec academics.[122]

Two proposals have flowed from French Canadian concern to protect the purity of the civil law. One proposal would abolish appeals to the Supreme Court of Canada and lodge final appellate jurisdiction in the Quebec Court of Appeal. The other proposal would create a separate civil law panel on the Supreme Court of Canada, consisting of a totality, or at least a majority, of civilian judges. The current practice of the Supreme Court of Canada is close to this second proposal. Although there is no separate civil law panel on the Court, most civil law appeals are now heard by a panel of five judges, three of whom are invariably the civilian judges.[123] Although these models vary in detail, they all reflect a desire to ensure that civil law issues be decided by judges trained and experienced in the civil law system.

In order to assess the validity of these proposals, it is essential to ask whether the Supreme Court of Canada has, in fact, distorted the civil law. The best evidence of distortion would be a significant body of cases in which the views of the civilian judges were overridden by the opinions of the English Canadian judges. There are examples of this: the most famous of them is *Taillon* v. *Donaldson*,[124] in which three English Canadian judges outvoted the two civilians, reversed the decision of the Quebec

Court of Appeal, and held that in child-custody cases the common law principle of the true welfare of the child was preferable to the principle, recognized in the Quebec Civil Code, of parental authority over the child unless the parent was unfit.[125]

But *Taillon* v. *Donaldson* is an aberration. A comprehensive study[126] has conclusively demonstrated that distortion of the civil law by common law judges has not occurred. This study examined the 139 civil law decisions of the Court from 1965 to 1978. Some of the highlights of the findings are: 122 of the 139 appeals were heard by five-judge panels on which three of the members were the civilian judges;[127] a unanimous decision was rendered in 105 of the cases;[128] the civilian judges wrote 137 majority judgments and twenty-five dissents;[129] the common law judges wrote only nine majority judgments and eight dissents;[130] of the nine majority judgments written by the common law judges, five represented the unanimous view of the Court, and two were concurrences.[131] Finally, in only three of the 139 cases did a majority of the common law judges override the views of a majority of the civilian judges.[132] And in only one of these three decisions did a common law judge write the judgment disagreeing with the majority view of the civilian judges.[133]

This analysis clearly supports the conclusion that the civil law has not been distorted by the Supreme Court of Canada. In the vast majority of cases, civil law appeals are heard by a panel composed of a majority of civilian judges. Furthermore the minority of common law judges on these panels play a largely passive role. On this basis, "it is difficult to see how one can accuse common law justices of 'corrupting' the civil law, when the only views expressed are those of the civil law judges."[134] Finally, in those few cases where the common law judges participate actively in the opinion-writing process, their opinions are almost always in accord with the dominant view of the civilian judges.

But statistics alone are not a complete response to the proposals to abolish appeals to the Supreme Court in civil cases or to create a separate civil law panel on the Court. In the realm of politics — and few would argue that the structure and functions of the Supreme Court are not significant issues politically, as well as legally — what people perceive to be the situation is just as important as the reality of the situation. And there can be no doubt that many Quebecers feel uncomfortable about taking cases to the Supreme Court of Canada. This feeling is deep rooted and durable,[135] and grows from a number of grievances.

First, many Quebecers think that the Supreme Court is not a fluently bilingual institution. Although the French Canadian judges have perfect facility in both languages, the same cannot be said, they claim, of the English Canadian judges. Secondly most English Canadian lawyers can easily practice law without coming into contact with Quebec's civil law. The reverse is not true. Because of the economic structure of Quebec society and the heavy concentration of a large English population in Montreal, most Quebec lawyers quickly come into contact with English law in their practices. This is particularly true of lawyers in urban centres such as Montreal, who generally are the ones ultimately to be appointed to the Supreme Court. The result is that English Canadian appointees to the Court have little previous contact with the civil law, whereas the French Canadian appointees are quite conversant with English Canadian statute and common law. Finally, although all Canadian lawyers might agree that the area of "mixed jurisdictions is a very privileged and fertile field of observation for the sociology of law,"[136] it can be doubted whether English Canadian lawyers, judges, and legal and academic institutions have been as open to the study of Quebec law as have been their Quebec counterparts in relation to the law in English Canada. This view has been expressed bluntly by Chief Justice Deschênes of Quebec. Speaking of the balance of common law and civilian views that has gone into the formulation of Canadian federal law, he said: "Quebec has shown the willingness and the ability to contribute to the building of such a national scheme of federal law, but the legal community of the rest of Canada has, by and large, closed itself off and away by simply ignoring the Quebec contribution. There now exists an actual separation in legal Canada, but it has been worked upon Quebec from without, not by Quebec from within."[137]

There is undoubtedly substantial truth in the Quebec perception that the Canadian legal system, including the Supreme Court of Canada, does not reflect an equal recognition, understanding, and application of our two great sources of law. Yet I doubt whether abolishing appeals to the Supreme Court of Canada is a necessary or desirable solution to the problem. It is not necessary because, as shown above, the Court has not been 'guilty' of distorting the civil law. It is not desirable, I believe, because the Court can serve as a model for the legal profession, the rest of the judiciary, and legal and academic institutions. If the Court could become knowledgeable and comfortable in both languages and both legal systems, and show this through its procedures and decisions, it would serve as a signal to all segments of the legal community. The Court has already taken important steps in this direction. It is officially bilingual: its proceedings and decisions are in both languages. More important, the old gap between fluently bilingual Quebec judges and fluently unilingual English Canadian judges is closing rapidly. The recent appointees to the Court from the common law provinces have worked exceptionally hard at becoming proficient in French and at familiarizing themselves with the civil law. If the gap continues to narrow, it will not be long before the Court becomes a truly national court in practice as well as in theory.

For these reasons I do not think it desirable to abolish appeals to the Supreme Court in civil cases or to create a separate civil law panel on the present Court. The Court should continue to exercise caution in entertaining appeals in civil cases from Quebec.[138] When it does take a civil case, the majority of judges hearing the case should be civilians. Indeed the Constitution should clearly provide for this. Finally, the panel in civil cases should consist of a majority, not a totality, of civilian judges, and the same should occur in appeals in provincial law cases from the common law provinces: civilians should always sit on the panel. I favour this mix for two reasons. First, there is always the possibility that an English Canadian judge will bring a different perspective or even rule to a civil law issue that the civilian judges might prefer to their own rule.[139] Secondly it is also possible that the English Canadian judges might learn something valuable from their civilian counterparts that they could use in a later case involving interpretation of the common law. For example, in *General Motors Products of Canada Ltd.* v. *Kravitz*,[140] a unanimous Court, speaking through Pratte J., decided that the Quebec Civil Code permitted a consumer to sue an automobile manufacturer *in contract* for latent defects in an automobile sold by the manufacturer to an independent dealer who in turn sold it to the plaintiff. Assuming this to be a sensible and progressive decision, it can be hoped that the common law judges who sat on the case will consider adoption of the new civil rule in a comparable case arising in a common law jurisdiction.

Cross-fertilization, therefore, can occur in two potentially valuable contexts: the English judges may bring something valuable to the resolution of a particular civil case; furthermore the English judges might learn something from the civilians that will be useful in future common law cases. The same two-pronged cross-fertilization can occur in provincial law cases from the nine common law provinces.

Constitutional Reform Model 2: Special Status for Quebec

The concept of special status has already been defined.[141] Constitutional reform along these lines has two potential implications for the Supreme Court of Canada: first, recognition that the distinctive character of the Quebec civil law deserves special protections not accorded to the private law of any other single province; secondly recognition of the special stake of Quebec, with its distinctive language and culture, in the outcome of federal-provincial constitutional controversies.

The Civil Law of Quebec

As far as the protection of the civil law is concerned, the most obvious way to accord Quebec special status would be to terminate its appeals to the Supreme Court of Canada in cases involving provincial law, while retaining appeals from the other provinces.[142] This would preserve the uniformity of the common law in the common law provinces while leaving to the courts of Quebec the exclusive and final power to develop the civil law of that province.[143]

Constitutional Controversies and Quebec

Constitutional litigation often reflects the dominant political issues of the day. Until the early 1980s those political issues centred on the economy and on the relationship between Quebec and the rest of Canada. Not surprisingly the Supreme Court's constitutional law docket has contained a number of cases in these two areas.[144] Unfortunately the Court's performance in the second category of cases has been roundly criticized in Quebec by both politicians and academics.[145] This criticism has served as the foundation for a long-standing Quebec proposal: the creation of a separate constitutional court[146] or at least a separate constitutional law panel on the current Court.[147]

Although proposals for a constitutional court vary in detail, most proponents of the court agree on four essentials.[148] First, the existence, composition, and jurisdiction of the court should be provided for in the Constitution. Secondly the basic jurisdiction of the court would be over all constitutional matters. When a constitutional issue arose in a case, it would be raised to the constitutional court, irrespective of the court level or stage of litigation at which the issue arose. The constitutional court would decide the constitutional issue and refer its decision back to the lower court. The lower court would then plug that decision into the total legal controversy that it had to resolve. Thirdly, because of the intersection of constitutional issues with history, economics, culture, sociology, and politics, appointees to the court could come from a broader group than do the present members of the Supreme Court. Members of the bench, bar, public service, and academic community, including, perhaps, some non-lawyers, would be potential candidates for appointment. Finally, since Canada is a bi-national country, and since our important institutions should reflect this fact, the constitutional court should consist of an equal number of English Canadian and civilian judges.

Although these four tenets are usually embodied in a single proposal by proponents of a constitutional court, it is important to note that the proposal, in fact, contains two completely separate ideas. The creation of the court, its specialized jurisdiction, and the selection of judges from a broad range of backgrounds relate to the *process* of decision making in Canada. These components of the proposal flow from the premise that many federal-provincial disputes should be resolved in the legal, as opposed to the political, arena and, therefore, the court deciding these issues should be made as expert as possible. On the other hand, the fourth component of the proposal, that is, the appointment of an equal number of English Canadian and civilian judges, relates to the *actors* in the decision-making process in the legal arena. Its premise is that all political decisions, including those of the highest court, should be made on a basis of equality between the two founding groups in Canada. The important difference between the two strands of ideas in the proposals for a constitutional court is this: the first three 'process' components of the idea say nothing about special status for Quebec; they relate only to the issue of how federal-provincial disputes are to be resolved and take no account of the underlying philosophy of federalism in the country. The fourth component, however, relates to the discussion of special status for Quebec: it flows directly from a dualist conception of the Canadian federation.

For myself, I have no difficulty accepting that the highest court in Canada, whatever it be called, should consist of an equal number of English Canadian and civilian judges. I have come to this conclusion for two reasons. First, Canada employs two legal systems, not ten. It seems appropriate to me, therefore, to recognize the dualist nature of the Canadian legal system by providing for an equal number of English Canadian and civilian judges on the highest court.[149] Secondly, although Confederation represented and represents a mixture of majoritarian, federalist, regional, and dualist values, I believe it appropriate to give special voice to the dualist concept in the composition of the Supreme Court of Canada because a final court should always be concerned to protect minority interests in a society, be they individual or group, and because so many minority concerns in Canada, especially those of minority groups, are linked closely to the special position and concerns of Quebec. I agree, therefore, with the conclusions of the Task Force on Canadian Unity: "We have proposed this near-equality of representation . . . both because of the two basic legal systems within Canada and because of the wider political duality within Canada. *We attach great importance to the crucial need to have Quebec look upon the Supreme Court as a bastion for the protection of that province's responsibilities for a distinct heritage*. If we are to accept the element of dualism within Canada, this is one place in our constitutional structure to give it fundamental recognition."[150]

Although I have no objection to the 'special status-composition' component of the proposed constitutional court, I have serious reservations about the whole idea of a constitutional court. Proponents of the court point to Europe and the United States, where constitutional courts have performed well.[151] They also state that specialization in many areas of the law is regarded as desirable and seems to result in better judicial decisions. They believe that a similar improvement in constitutional decisions could be anticipated if Canada had a 'specialist' constitutional court, particularly if it were composed of judges with experience and expertise in constitutional affairs.

In spite of these arguments, there are at least four substantial objections to the creation of a constitutional court in Canada. First, the success of the constitutional courts in the United States and Europe (primarily West Germany) is partially attributable to some special features in those countries that do not exist in Canada. The United States is a society that attaches great significance to the constitutional principle of 'separation of powers', and this places the American judiciary on an equal footing with the other branches of government. This explains the American people's easy acceptance of the fact that its highest court plays an active and significant role in major constitutional issues. The West German constitutional court has been allowed to achieve a similar high profile: "The Federal Constitutional Court has prospered because, like its American counterpart, it met an important political need — the need for an institution to authoritatively settle major disputes not settled elsewhere in the system."[152] In addition West Germany is a thoroughly homogeneous society with no cultural, ethnic, or linguistic cleavages. Furthermore specialization is a hallmark of both the German legal profession and the German court system.[153] A specialist constitutional court, therefore, has deep roots in the legal fabric of the nation. Finally, it is important to note that in both West Germany and the United States, the constitutional courts are engaged largely in the adjudication of disputes between citizens and government, and between different branches of the same government. The resolution of disputes between the two levels of government forms a miniscule part of the docket of both these constitutional courts.[154]

The picture in Canada is entirely different. Proponents of a constitutional court would have it play a major role in the resolution of federal-provincial disputes in a society that is a prism of ethnic, linguistic, cultural, and regional tensions. They would have the court do this within a legal system that has never emphasized specialization and a political system that has attached great weight to political, as opposed to legal, resolution of major constitutional issues. This very brief statement of the differences between Canada and its two federal counterparts should make it clear that the success of constitutional courts in the other two federations is no guarantee of similar success in Canada. The differences in political theory, historical factors, and current realities make conclusions based on comparative study of little value.

A second argument against a Canadian constitutional court is a familiar one: constitutional questions often do not arise in a pure state. Rather, they come mixed with issues of the interpretation of statute and common law, as well as with issues of federal and provincial law. All the problems of 'mixed law' surface again. If a specialist constitutional court is to decide only constitutional issues, then the complexities of issue identification and the inefficiency and injustices of fragmented jurisdiction cannot be avoided.

Thirdly there is another dimension of the mixed law problem relevant to the proposal to create a constitutional court. Constitutional law is not really an independent phenomenon. Constitutional issues do not arise in a vacuum: they take their shape or form from the situations and legal categories — property, commerce, natural resources, communications — in which they arise. In consequence,

> . . . judges who appreciate the whole system of law are needed to assess the theme, purpose and effects of the particular challenged law in its living context. There are competing issues of classification and competing precedents, so that any type of law may be challenged at one time or another in our history. This all-round appreciation of the total legal system then is necessary background and competence for the proper disposition of any federal power-distribution issues that may come up. Such a constitutional issue cannot be separated from the nature and effect of the statute the validity of which is being challenged. The plain implication here is that the more learned a judge is in all the main departments of the law — family law, criminal law, property law, commercial law and so on — the better qualified he is to decide wisely federal issues concerning the situs of the powers to pass these various types of laws.[155]
>
> It also follows that the best federal constitutional court is one that has a general as well as a constitutional appellate jurisdiction, because the appellate judges, in their non-constitutional cases, are ranging over many issues in all the principal departments of the total legal system. Thus, they 'keep their hands in', so to speak, as reasonably expert and knowledgeable professional persons concerning all the main types of laws and current social problems.[156]

Again, and perhaps most critically, the creation of a specialist constitutional court could result in a great many more public issues of the day being decided *by that court* and *on legal grounds* than by politicians on political grounds.[157] If, at an early stage of a case, constitutional issues are separated from the rest of the case and referred to a constitutional court, that court is precluded from deciding the case on non-constitutional grounds. And once the court is obliged to decide a case on a constitutional basis, governments may be precluded from dealing with the matter through a process of intergovernmental negotiation and compromise. Take, for example, a complicated and emotional communications dispute between Ottawa and Quebec involving potential federal jurisdiction under the broadcasting power, and potential provincial jurisdiction under the education power. Perhaps the issue is so crucial that neither level of government can afford to lose the entire case. The present Supreme Court might be able to decide the specific case on a narrow statutory point of interpretation, administrative law, or common law, leaving the broader, head-on, broadcasting-education conflict for resolution at a later date. This method would give the respective governments more time to work out a political solution that, by definition, would be a compromise in which neither government would completely lose.

The political process, in my view, is the best process for resolving most federal-provincial issues. It is messy and time consuming, but it has the virtue of involving precisely those people we elected to make decisions for us. Furthermore it is likely, in my opinion, to result in more correct decisions being made than would probably be made in the judicial arena. A specialist constitutional court making constitutional decisions is faced with a number of high hurdles. It will not see the whole problem: the part of the problem it does see will have to be viewed in a vacuum, divorced from its social and legal context; the decision of the court will have to be made before any lower court or many politicians have given potentially helpful first responses to the problem; and the court's decision will have to be absolute, creating a clear winner and a clear loser. It would take an incredibly lucky constitutional court to clear all these hurdles consistently and make wise constitutional decisions. For myself, although I acknowledge that the highest court should act as an ultimate umpire in Canada, I would not want to create an institutional structure that encouraged easy resort to that umpire.[158]

Constitutional Reform Model 3: Sovereignty-Association

The concept of sovereignty-association has been previously defined.[159] The white paper published by the Quebec government makes it clear that the concept is premised on a complete political separation between Canada and Quebec, followed by a close and formal integration between the two nations in economic matters of joint concern.[160]

The consequences of this new arrangement could be far reaching for the Canadian court system, including the Supreme Court of Canada. The core of the 'association' component of the 'sovereignty-association' concept has always been in the economic area. There has never been any suggestion that the legal systems of the two countries would be common or shared. Presumably, therefore, both Canada and Quebec would establish comprehensive, but entirely separate, domestic court systems that would include separate final appeal courts.

But to say that sovereignty-association will mean two separate, independent, court systems is only part of the story. The sovereignty-association concept envisages the development of a new body of laws to regulate the affairs of the two nations in the realm of economics. That Quebec foresees the economic 'association' between Canada and Quebec as very close and sophisticated is clear from the white paper. After distinguishing among four formulas for general economic integration "from the least restrictive to the most complete: the free trade zone, the customs union, the common market and the monetary union,"[161] the Government of Quebec clearly opted for the monetary union model. The government then proceeded to define the implications of that model for Canada-Quebec relations: "A monetary union . . . is . . . the area formed by sovereign states within which goods, people and capital flow freely, this zone on the one hand being linked to the rest of the world by a single trade and tariff policy and, on the other hand, possessing a single currency and hence the same monetary policy."[162]

What institutional arrangements, including legal arrangements, will be required to regulate these new and complicated economic relations? Again, the Quebec white paper provides one possible answer. Aside from a transitional commission of experts, which will assist the two countries in separating their affairs, the white paper suggests that there should be three permanent institutions to regulate the economic affairs of the nations. A central monetary authority[163] and a community council[164] would set economic policy. The third institution would be a court of justice that the Quebec government has described in these terms: "The court of justice will comprise an equal number of judges appointed for a limited period of time by Québec and by Canada, and a chairman chosen jointly by the two States. It will have exclusive jurisdiction over the interpretation and implementation of the treaty of association; its decisions will be final and binding to both parties."[165]

Putting flesh on this bare-bones description of the court of justice is not entirely a matter of speculation. It is clear that the Quebec government's theory of sovereignty-association and the institutions it would create to give effect to that theory are similar in many respects to the theory and practice of the European Economic Community (EEC). The EEC is a closely integrated economic union of sovereign nations. Although its creators may have regarded economic union as merely a way-station on the road to political union, it is now plain that economic union provides the primary reason for the continuing existence of the Community. Accordingly the Community is a fertile source for comparison if constitutional reform in Canada is to proceed along the sovereignty-association lines proposed by Quebec. Specifically an examination of the structure and jurisdiction of the Community Court is likely to provide useful clues concerning the possible legal institutions that will be required to regulate the economic association between Canada and Quebec.

The Court of Justice of the European Communities is a creation of the treaties that established the various Communities. It is composed of a single judge from each member-state. The jurisdiction of the Court is extremely wide. Broadly speaking, the Court's role is to interpret the EEC treaties and ensure that member-nations and Community institutions comply with the treaty provisions.

More specifically the Court has jurisdiction in two broad categories of cases: actions against member-states and actions against community institutions. Actions against a member-state can be initiated by another member-state or by a community institution, but not by an individual. Actions against a community institution can be brought by another community institution, a member-state, or a private party. The Court's substantive jurisdiction ranges over a broad spectrum of economic matters, including customs, tariffs, agriculture, transportation, competition, industrial policy, monetary policy, and the free movement of persons, services, and capital throughout the Community.[166]

One final point is worthy of note. Although the Court of Justice is ultimately responsible for the interpretation of Community law, this does not mean that the national courts of the member-states take no part in applying that law. In fact, in almost all cases involving disputes between an individual and a Community institution, the litigation takes place in a national court. The usual relationship between national courts and the

Court of Justice has been well set forth as follows: " . . . although the Court in Luxembourg is often described as the Community Court, an essential role in the application of Community law is played by the whole range of national courts and tribunals. In civil and commercial matters, in administrative and industrial disputes, and even in criminal cases, all these courts may have to apply Community law, and they too are therefore, in a very real sense, Community courts. In this capacity they are to be guided and assisted by the Court of Justice, *and to adopt the principles of interpretation developed by the Court* . . ."[167]

If one accepts that Quebec's concept of sovereignty-association is very similar to the thinking that gave birth to the ECC, and if one posits that Canada would likely work towards similar institutional arrangements and practices, it becomes possible to move beyond the white paper's cursory description of the structure and functions of the court of justice. The legal arrangements flowing from the inauguration of sovereignty-association might well approximate the following situation.

There would be a new court charged with interpreting the treaty that created the economic association between Canada and Quebec. The court would be a creature of the treaty. It would consist of an equal number of Canadian and Quebec judges. Because its primary functions would be in the realm of public law, since most issues would involve one of the governments or community institutions, many of the judges might have broad experience in political or governmental affairs. Politicians, public servants, and academics with expertise in public law subjects might hold many more places than such people hold on the present Supreme Court of Canada.[168] Additionally, since the court would be a specialist court involved very heavily in economic issues, it is possible that it would include some economists, even if they had no legal training or experience.[169]

The court's basic jurisdiction would be the interpretation and enforcement of treaty law. It would certainly be given jurisdiction in cases where Canada and Quebec were the parties. It also would be granted jurisdiction in cases involving the main institutions of the association, the community council, and the central monetary authority. The only difficult question would be whether to allow the court to judge cases between individuals and member-states or community institutions. This would depend on whether the economic association was viewed as a largely political system structuring the relationships between governments or as a political and legal régime giving rise to rights in citizens as well as governments. If the economic association were intended to take this latter broader shape, there could be no serious objection to allowing individuals to have standing before the court.

Finally, the interpretation of treaty law would likely involve the creation and maintenance of a relationship between the court of justice and the domestic courts, especially the final appeal courts, of Canada and Quebec. Although the treaty might provide for the identification of all issues of treaty law and the immediate referral of those issues to the court of justice, the more likely and sensible arrangement would permit domestic courts to rule on treaty-law questions in the context of all the issues in a case. The treaty might provide for either permissive or obligatory reference by national courts of particularly difficult or sensitive treaty questions to the court of justice.[170] But the norm would probably be initial decision by the domestic courts with a right of appeal to the court of justice on the treaty-law issues in the case.[171]

One final comment may be made about the possible effects of sovereignty-association on the structure of the courts in Canada and Quebec. The analysis above has been premised on the existence of a treaty creating rights and obligations in Canada and Quebec in relation to certain areas of economic activity of mutual interest. A 'Community Court' could well be established and charged with the interpretation of laws governing these economic activities. Hypothetically, Canada and Quebec might decide to create joint community laws in other areas as well. For example, the two countries might decide to enact a single framework of human rights legislation applicable to both nations. If this happened, then the existing Community Court, or perhaps a second Community Court specializing in human rights cases, might be given jurisdiction to interpret and enforce these laws.[172] In other words, as the number of legislative areas of association between Canada and Quebec expanded, a parallel growth in the jurisdiction of the Community Court(s) could be anticipated.

Constitutional Reform Model 4: Quebec Independence

The concept of Quebec independence has been previously defined.[173] It involves the creation of two completely independent nations with no formal shared institutions or laws. Any issues of mutual concern to Canada and Quebec would be resolved through the normal international diplomatic and legal channels and not through resort to a body of shared laws interpreted by a common court.

Conclusions

It is clear from the foregoing analysis that constitutional reform of any kind will probably have significant consequences for the Supreme Court of Canada. I have attempted to describe and evaluate some of those consequences. It remains briefly to make explicit some of the conclusions that flow from my analysis.

The Supreme Court of Canada is very much part of the Canadian political system. In its role as ultimate constitutional interpreter, it is engaged in the setting of public policy in many important areas of our national life. Accordingly personal views about reform of the Court must flow from personal views about constitutional reform in the wider political system.

This is not the place to set out in detail my thoughts on constitutional reform.[174] In short, however, I believe that complete Quebec independence, sovereignty-association, and massive decentralization are all undesirable as models of constitutional reform. Constitutional reform in Canada should proceed in two general directions. First, as the Government of British Columbia has been insisting, the Constitution should be revised in favour of giving the provinces or regions of the country a greater voice in the operation of major national institutions. Although devolution of legislative powers to the provinces is not required, greater provincial participation in law making at the national level is desirable. Secondly, on the spectrum between strictly majoritarian (the traditional English Canadian view) and strictly dualist (the dominant French Canadian view) conceptions about the nature of the Canadian federation, I believe that the present balance must be shifted towards the dualist position in order to accommodate the distinctive historical, linguistic, and cultural exigencies of Quebec's place in a vast, predominantly English, North American continent.

Constitutional reform along these two lines has two major implications for the Supreme Court of Canada, one *structural*, the other *jurisdictional*. If the provinces were granted greater powers to participate in national policy making, and if the underlying philosophy and structure of the law-making process in the country became more dualist, the following structural changes in the Court would be desirable. First, the existence, composition, and jurisdiction of the Court should be provided for in the Constitution; these aspects should not be subject to unilateral alteration by either level of government. Secondly the Court should be composed, as nearly as possible, of an equal number of English Canadian and civilian judges. Since I believe that oral hearings, judicial consultations, and opinion writing are optimal when the Court consists of nine members, I think that the regional distribution of judges should be, Atlantic provinces: 1; Quebec: 4; Ontario: 1; Prairie provinces: 1; British Columbia: 1. The ninth judge could be appointed from any region of the country. Thirdly there should be equal participation between the federal and provincial governments in the appointment of judges to the Court. I favour the federal-nomination/Senate-ratification model that has been suggested by so many governments and study groups in the last two years.

Constitutional reform along the two lines suggested above *does not require* changes in the jurisdiction of the Supreme Court of Canada. Nor would changes be desirable. For reasons discussed in detail earlier in this paper,[175] I do not favour the abolition of appeals to the Supreme Court of Canada in provincial law cases, including Quebec civil cases. Furthermore I think there is little merit in the polar opposite proposals concerning the Court's constitutional jurisdiction: the proposal to abolish the Court's jurisdiction in constitutional cases, and the widespread proposal in Quebec to create a specialist constitutional court. Both proposals ignore the delicate balance between political and judicial policy making in the realm of federal-provincial relations. In my view, the Supreme Court of Canada has played, and can legitimately hope to play, a *secondary* and *useful* role in this most crucial area of our national life. The first proposal would deny the 'useful' aspect of the Supreme Court's role by abolishing it completely. The Quebec proposal might jeopardize the 'secondary' aspect of the Court's role by involving the Court in a wide range of constitutional issues that could be better resolved in the political arena.

'Balance' should be the key word in defining the Court's jurisdiction. The Court's present constitutional jurisdiction *is* balanced. It allows the Court to decide constitutional issues, to intercede when a private citizen or a government believes that another government is breaking fundamental constitutional rules. But it also allows the Court to avoid constitutional issues in appropriate cases (for example, by deciding a case on procedural or substantive, but non-constitutional, grounds) in the hope that further negotiations in the political arena will result in a solution satisfactory to all parties. This delicate balance among individuals, governments, and the Court and this constant dialogue between political and judicial actors, all of which contribute to the setting of public policy and, ultimately, of Canada's constitutional law, have both deep historical roots and substantial merit. The balance and the dialogue should not now be upset either by abolishing the Supreme Court's role or by expanding it.

Notes

1. The essence of federalism is a distribution of powers between two levels of government. Under the usual, and current Canadian, model of federalism, the national government exercises powers that do not differ significantly from one part of the country to another. At the same time each province exercises powers that do not differ significantly from those exercised by any other provincial government. The model of revised federalism, in contradistinction to that of special status, would not change that basic structure. It might, however, result in redistribution of legislative powers between the two levels of government or a change in the institutional process by which federal-provincial issues are resolved. For a fuller description of the various directions revised federalism might take, see text pp. 173–98.

2. Under the special status model of constitutional reform, Canada would remain a separate state where a national government continued to exercise powers over people in every part of the country, and where each province would have a government that continued to exercise powers over people within its territory. Special status differs from revised federalism in that the powers accorded by the Constitution to one or more provincial governments would differ significantly from those accorded to other provincial governments. For example, Canada would have the characteristics of special status if the British North America (BNA) Act were amended to give Quebec more extensive powers over cultural matters than were possessed by the other provinces. Under a system of special status, the powers of the national government would probably, but not necessarily, be less extensive over the people of the special status province than over the people in the other provinces.

3. Under the sovereignty-association model of constitutional reform, Canada would divide into two separate states: Canada-without-Quebec and Quebec. Each state would be recognized as separate in international law. Each would have a separate constitution. However, the states would be formally associated for a number of common economic purposes; these might include freedom of movement of people, free trade, a common tariff, identical currency, and an identical monetary policy. This formal economic association would probably require the creation of a wholly new institutional infrastructure to make decisions and administer policies in the areas of joint concern. For a full definition of the concept of sovereignty-association and a description of some suggested institutional implications, see Québec, Conseil exécutif, *Québec-Canada: A New Deal. The Québec Government's Proposal for a New Partnership Between Equals: Sovereignty-Association* (Quebec: Éditeur officiel, 1979).

4. Under this model of constitutional reform, Canada would divide into two separate states: Canada-without-Quebec and Quebec. Each state would be recognized as independent in international law. Each would have a separate constitution. Relations between the two states would be confined to international law and diplomacy. There would be no institutions of government common to both states that exercised significant powers over the governments of people of either state. The relations now existing between Canada and the United States, for example, have the characteristics inherent in this option for Canada-without-Quebec and Quebec.

5. Although a great many countries, including many in the Communist bloc, call themselves 'federal constitutional democracies', only four other countries have a theory and practice of government that approximate the Canadian system. These countries are the United States, Switzerland, Australia, and West Germany. Since the Second World War many countries have experimented with the federal, constitutional, and democratic form of government, but these attempts have ended in failure. See R.L. Watts, *New Federations* (Oxford: Clarendon Press, 1966).

6. Sir John A. Macdonald, however, thought that the distribution of powers between the two levels of government was clearly defined. "We have avoided," he said, "all conflict of jurisdiction and authority." See *Parliamentary Debates on the Subject of Confederation*, 3rd Session, 8th Parliament of Canada (1865), p. 33. More than one hundred years later, it is obvious that Macdonald's optimism was completely misplaced.

7. This raises separation-of-powers issues that are particularly important in the United States and are becoming increasingly important in Canada. For discussion of some of the recent Canadian litigation, see J.C. MacPherson, *Developments in Constitutional Law* (Vancouver: University of British Columbia, 1978), pp. 13–42.

8. This raises issues of federalism, the traditional core of constitutional litigation in Canada.

9. This raises civil liberties issues that have come before the Supreme Court of Canada more and more often in recent years because of the great growth of civil liberties legislation in Canada since the Second World War.

10. For example, a court might be asked to interpret section 20 of the BNA Act, which provides for an annual session of Parliament.

11. For example, in *McKay* v. *The Queen* [1965] S.C.R. 798, the Court was asked to interpret statutory provisions that affected advertising during election campaigns.

12. [That is, the breach of a duty imposed by law, whereby some person acquires a right of action for damages.]

13. See Peter H. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution* (Ottawa: Queen's Printer, 1969), pp. 1–11 for an excellent discussion of the debates and proposals from 1867 to 1875 concerning a final appellate court.

14. From 1867 to 1935, final appellate authority was exercised by the Privy Council. From 1935 to 1949, the Supreme Court of Canada had final jurisdiction in criminal cases, the Privy Council in all other matters. In 1949 the Supreme Court was made the final court in all matters.

15. For a more complete description of the Court's role, see text pp. 168–73.

16. For a concise description of the general nature of the Canadian court system, see Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977), pp. 115–17.

17. British North America Act, 1867, 30 and 31 Vict., c. 3 (U.K.)

18. *Ibid*., section 101.

19. Supreme and Exchequer Courts Act, 1875, Vict., c. 11 (Can.)

20. See now Supreme Court Act, R.S.C. 1970, c. S–19, as amended.

21. A constitutional convention is a regular practice accepted by all participants in the political process. Of the three sources of the Court's composition, constitutional convention is the least important. Indeed, events in the 1970s might support the conclusion that there are no longer any constitutional conventions concerning the Court's composition. See discussion in text pp. 168–70.

22. [That is, holding positions subordinate to that of the Chief Justice.]

23. The Court did not always consist of nine justices. The original Court had six. This was increased to seven in 1927 and to nine in 1949. See Hogg, *Constitutional Law of Canada*, p. 122.

24. Since 1949 the Chief Justices have been successively Rinfret (Quebec), Kerwin (Ontario), Taschereau (Quebec), Cartwright (Ontario), Fauteux (Quebec), Laskin (Ontario). For discussion see Russell, *The Supreme Court of Canada* . . ., pp. 69–71.

25. Each of the men listed in note 24, except Chief Justice Laskin, was the most senior puisne judge on the Court at the time of his appointment to the chief justiceship.

26. This is certainly the norm in most countries, but it is not an invariable practice. For example, persons who were not lawyers have been appointed to the Court of Justice of the European Communities. See Lionel N. Brown and Francis J. Jacobs, *The Court of Justice of the European Communities* (London: Sweet & Maxwell, 1977), pp. 26–27.

27. I think it important to distinguish between pre-1949 and post-1949 appointments to the Court. Before 1949 the Supreme Court was not the final Court in Canada. Hence political appointments were perhaps not as potentially dangerous because appeals from decisions by the Supreme Court could be taken to the Privy Council. Thus it is hardly surprising that three members of the original Supreme Court were very active politicians immediately before their judicial appointments. Today, when the Court has final jurisdiction over many federal-provincial disputes, such appointments would be very surprising because of the obvious need for the Court to be seen as totally impartial.

28. Mr. Justice Abbott, appointed to the Court in 1954, was a former federal Cabinet Minister. Mr. Justice Chouinard, appointed in 1979, was a former defeated candidate in a federal election. This very low percentage (about ten per cent) of appointees with previous political experience is in striking contrast to the pre-1949 practice, where previous political experience was one of two usual career paths to the Court. See Russell, *The Supreme Court of Canada* . . ., pp. 72–73. Four other Canadian judges in the 1949–1980 period have held important, although non-elective, government positions. See note 34 below.

29. Recent well known examples include former Chief Justice Warren and former Justice Black who were respectively Governor of California and Senator from Alabama before their appointments to the United States Supreme Court.

30. Appointees in this category include Justices Reed, Douglas, Jackson, Marshall, and Rehnquist.

31. See the analysis in Brown and Jacobs, *The Court of Justice of the European Communities*, pp. 33–48.

32. The nine appointees since 1970 have been Chief Justice Laskin and Justices Dickson, Beetz, de Grandpré, Estey, Pratte, McIntyre, Chouinard, and Lamer. All except Chief Justice Laskin had substantial experience in private practice. All of the last eight practitioners were lawyers in major cities.

33. Chief Justice Laskin taught law at the University of Toronto and Osgoode Hall Law School from 1940 to 1965. Mr. Justice Beetz taught at the University of Montreal from 1953 to 1973. Mr. Justice Pratte was Dean of Law at Laval University from 1962 to 1965.

34. Mr. Justice Beetz was a senior adviser on federal-provincial and constitutional matters to the Government of Canada and the Government of Quebec. Mr. Justice Pratte was chairman of Air Canada, a federal Crown corporation. Mr. Justice Chouinard, as well as being a defeated candidate in a federal election, was a senior Quebec public servant who at one time had served as Quebec's Deputy Minister of Justice. Mr. Justice Lamer was a chairman of the federal Law Reform Commission of Canada.

35. Chief Justice Laskin served on the Ontario Court of Appeal from 1965 to 1973. Mr. Justice Dickson served on the Manitoba Court of Queen's Bench from 1963 to 1967 and on the Court of Appeal from 1967 to 1973. Mr. Justice Beetz served on the Quebec Court of Appeal from 1973 to 1974. Mr. Justice Estey served on the Ontario High Court and Court of Appeal from 1973 to 1977. Mr. Justice McIntyre served on the British Columbia Supreme Court from 1967 to 1972 and on the Court of Appeal from 1973 to 1978. Mr. Justice Chouinard served on the Quebec Court of Appeal from 1975 to 1979. Mr. Justice Lamer served on the Quebec Superior Court from 1969 to 1971 and on the Court of Appeal from 1978 to 1980.

36. The Court's appellate jurisdiction is provided for in sections 35 to 45 of the Supreme Court Act. The comprehensive nature of the Court's jurisdiction and the finality of its judgments are established by section 54(1). The Court's original jurisdiction occurs in the realm of reference cases that are provided for in section 55. The reference vehicle is used by the federal government primarily to resolve important constitutional disputes. Recent examples include *Offshore Mineral Rights Reference*, [1967] S.C.R. 792, *Anti-Inflation Reference* [1976] 2 S.C.R. 373, and *Reference Re Legislative Authority to Alter or Replace the Senate*, (1979) 102 D.L.R. (3d) 1. Occasionally the reference case is used to resolve a non-constitutional issue. An example is *Reference Re Steven Murray Truscott*, [1967] S.C.R. 309.

37. Until 1975 the Court had to hear all appeals in civil cases with a monetary value of more than $10 000. This compulsory jurisdiction was abolished in 1975 by S.C. 1974–75–76, c.–18. This has largely freed the Court to set its own docket. The only major constraint on the Court's discretion is in the area of criminal law, where the Court is obliged to hear certain cases. For a thorough discussion of the jurisdiction of the Supreme Court of Canada, see Peter W. Hogg, "Jurisdiction of the Supreme Court of Canada," paper delivered at the Conference of the Canada–United States Law Institute on Comparison of the Role of the Supreme Court in Canada and the United States, at the Law School of Case Western Reserve University, Cleveland, Ohio, 20 October 1979.

38. This trend emerges from an examination of the statistical survey of the Court's case load compiled by the editors of the *Osgoode Hall Law Journal* every year since 1961 and from *The Supreme Court Law Review* (1980), which analyses the Court's case load in the 1978–79 term.

39. The final courts in the United States, West Germany, and Switzerland are primarily concerned with constitutional and other public law matters. Only the Australian High Court approximates the emphasis given private law matters by the Supreme Court of Canada.

40. See note 37.

41. Professor Russell has shown that this view was taken in 1869 and 1870 as soon as the first bills proposing the creation of the Supreme Court of Canada were introduced in Parliament:

> Both Galt and Cartier in their explanations of the general appeal court's functions emphasized this role, especially with relation to federal criminal law and commercial law. But there was a tendency to look for a broader process of legal assimilation which would touch the general jurisprudence of the country including many of those matters subject to provincial legislative power under the B.N.A. Act. There was certainly constitutional support for this projected function as far as the common-law provinces were concerned, for both the Quebec Resolutions and Section 94 of the B.N.A. Act looked forward to the provinces of Nova Scotia, New Brunswick and Ontario granting the federal legislature the power to establish uniform laws in relation to property and civil rights. However, even without the implementation of this uniformity clause, if appeal was [*sic*] to lie from provincial courts to the general appeal court in provincial law matters, this in itself would give the general appeal court a real opportunity to introduce a measure of uniformity into the provincial legal systems.

See Russell, *The Supreme Court of Canada . . .*, pp. 6–7.

42. For a comprehensive analysis of some of the recent litigation in this area, see David J. Mullan, "Developments in Administrative Law: The 1978–79 Term," *The Supreme Court Law Review* 1 (1980): 1–76.

43. From 1950 to 1975, the Court handled sixty-four constitutional cases, an average of 2.5 per year. The figures for the late 1970s are, 1975: 4; 1976: 7; 1977: 13; 1978: 6; 1979: 9.

44. See, for example, *Anti-Inflation Act Reference*, [1976] 2 S.C.R. 373; *Capital Cities Communications Inc.* v. *Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141; *Public Service Board* v. *Dionne*, [1978] 2 S.C.R. 191; *Attorney General of the Province of Quebec* v. *Kellogg's Co. of Canada*, [1978] 2 S.C.R. 211; *Canadian Industrial Gas and Oil Ltd.* v. *Government of Saskatchewan*, [1978] 2 S.C.R. 545; *Central Canada Potash Co.* v. *Government of Saskatchewan*, [1979] 1 S.C.R. 42; *Blaikie* v. *Attorney General of Quebec*, (1980) 30 N.R. 225 (S.C.C.)

45. For discussion of many of the Court's decisions in the civil liberties area, see W.S. Tarnopolsky, *The Canadian Bill of Rights*, 2d rev. ed. (Toronto: McClelland and Stewart, 1975).

46. For discussion of some of the recent cases in this area, see MacPherson, *Developments in Constitutional Law*, pp. 13–42.

47. It is important to emphasize the historically limited nature of the Court's role in federal-provincial controversies. Only twice, during the New Deal and in the later years of the Trudeau government, has the Court been actively involved on a consistent basis in the pivotal issues of the day. The more usual mechanism for the resolution of federal-provincial controversies has been the process of political negotiation and compromise. This process has been well described by Richard Simeon, *Federal-Provincial Diplomacy, the Making of Recent Policy in Canada* (Toronto: University of Toronto Press, 1972).

48. For example, the claims of many provinces, including Alberta, British Columbia, and Newfoundland, to exercise primary jurisdiction over their natural resources challenge the federal government's ability to play its traditional 'equalization' role.

49. The most comprehensive criticism of the federal government's alleged abuses in this area is contained in the three reports of the Western Premiers' Task Force on Constitutional Trends published in 1977, 1978, and 1979. For criticism by Quebec politicians, see Claude Morin, *Quebec versus Canada: The Struggle for Self-Government 1960–1972* (Toronto: University of Toronto Press, 1976) and Constitutional Committee of the Quebec Liberal Party, *A New Canadian Federation* (Montreal, 1980), pp. 22–23. Hereinafter cited as the 'Beige Paper'.

50. For example, unlike the King, St. Laurent, and Pearson governments, the Trudeau government did not unilaterally establish new shared-cost programs against the wishes of the province. Indeed the reorganization of federal-provincial shared-cost programs in 1977 entailed a substantial reduction of federal encroachments into areas of provincial jurisdiction. Furthermore the Trudeau government bent over backwards to get unanimous provincial agreement to constitutional changes. This contrasts sharply with Prime Minister St. Laurent's approach: he moved to admit Newfoundland to Confederation and to add section 91(1) to the BNA Act without first obtaining the consent of the provincial governments.

51. For example, if co-operative federalism had been working well, it is doubtful that a case like *Regina* v. *Hauser*, (1979) 98 D.L.R. (3d) 193 (S.C.C.), which involved the power of the federal government to enforce federal legislation (The Narcotic Control Act), would have become a *cause célèbre* in which nine provinces contested the federal position. The long list of provincial governments as either principal parties or interveners in many recent constitutional cases leads to the inescapable conclusion that the provinces have adopted an almost pro forma response, that is, automatic disagreement with the federal position. Surely, if the provinces were happy with the way in which disputes were being resolved in the political arena, their negative response would be less automatic and pervasive.

52. Two notable examples are *Reference Re Anti-Inflation Act*, [1976] 2 S.C.R. 373 and *Reference Re Legislative Authority of Parliament to Alter or Replace the Senate*, (1979) 102 D.L.R. (3d) 1.

53. This tendency of the federal government has been described and sharply criticized as "an unnecessarily aggressive approach by the federal Government" in the *Second Report* of the Western Premiers' Task Force on Constitutional Trends (1978), p. 30.

54. See *Thorson* v. *Attorney-General of Canada*, [1975] 1 S.C.R. 138 and *Nova Scotia Board of Censors* v. *McNeil*, [1976] 2 S.C.R. 265.

55. Although some individual judges have held that the preamble of the BNA Act creates an "implied bill of rights," that view has never been accepted by a majority of the Court and seems to have been expressly doubted by Beetz J. speaking for the majority of the Court in *Attorney-General for Canada* v. *Dupond*, [1978] 2 S.C.R. 770. Beetz J. said that "none of the freedoms referred to is so enshrined in the Constitution as to be above the reach of competent legislation" (p. 796). For further discussion of the implied bill of rights question, see Hogg, *Constitutional Law of Canada*, pp. 429–30 and J.C. MacPherson, "Developments in Constitutional Law: The 1978–79 Term," *The Supreme Court Law Review* 1 (1980), pp. 124–27.

56. See, for example, the proposed Constitutional Amendment Bill, 1978 (Bill C–60), sections 5–29.

57. Recent support for this suggestion is contained in an article written by Mr. Justice Dickson. His partial explanation for the conservatism of the Court in interpreting the Bill of Rights is as follows:

> The *Bill of Rights* gave the Courts a power they never had before enjoyed, a power with which they had no experience and no rules upon which to draw. The *Bill of Rights*, as interpreted in *Drybones*, effected a significant transfer of power from Parliament to the courts.
>
> And the important feature of this revolutionary transfer of power, perhaps the crucial one, was that it was effected, not by a constitutional amendment, but by an ordinary statute of the Parliament of Canada. Small wonder, then, that the courts have demanded proof of compelling reasons before invoking a mere statutory jurisdiction to deny operative effect to a substantive measure, duly enacted by a Parliament constitutionally competent to do so.

See Dickson, "The Role and Function of Judges," *Law Society of Upper Canada Gazette* 14 (1980) p. 170. The validity of this line of reasoning has been questioned recently by the Government of British Columbia. Having pointed out that the current non-entrenched Bill of Rights with its *non obstante* clause might encourage the Court to be 'activist' in its interpretation of the Bill of Rights — Certainly the case law denies even the hint of such activism! — British Columbia concludes "that this additional rigidity [that is, an entrenched bill of rights] would lead the Court to be as cautious, if not more so, in invoking the provisions of an entrenched charter as it has been with respect to the present Canadian Bill of Rights." See Government of British Columbia Constitutional Proposals, Paper No. 6, *A Bill of Rights and the Constitution of Canada* (1978), p. 67.

58. For discussion of the various theories of federalism and their place in Canada in recent years, see Donald V. Smiley, *Canada in Question: Federalism in the Seventies*, 2d ed. (Toronto: McGraw-Hill Ryerson, 1976) and Edwin R. Black, *Divided Loyalties — Canadian Concepts of Federalism* (Montreal: McGill-Queen's University Press, 1975).

59. Paul Weiler, *In the Last Resort — A Critical Study of the Supreme Court of Canada* (Toronto: Carswell/Methuen, 1974).

60. *Ibid.*, p. 175. Weiler would grant the Court a role only in cases that raised competing federal and provincial laws (p. 181). Given the Court's very narrow interpretation of what constitutes conflicting laws, this would be a small constitutional work load indeed. For a thorough discussion of the Court's handling of cases involving competing legislation, see Hogg, *Constitutional Law of Canada*, pp. 101–14.

61. *Ibid.*, pp. 164–65.

62. *Ibid.*, p. 165. "There is no logical necessity for judicial review in a federal system, even though federalism by its very nature involves the creation of *limited* legislative powers. A further inference is still necessary to show that the ordinary courts have the final say in determining whether legislation duly enacted by a representative body is *ultra vires* and thus null and void."

63. *Ibid.*, p. 179.

64. W.R. Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation," *Canadian Bar Review* 53 (1975), pp. 616–18.

65. My own view is that the Court's constitutional decisions in the area of federal-provincial relations in the 1970s have been, by and large, fairly good on their merits. See MacPherson, "Developments in Constitutional Law . . .," pp. 131–33.

66. *Ibid.*

67. See *Capital Cities Communications Inc.* v. *Canadian Radio-Television Commission*, [1978] 2 S.C.R. 191; *Public Service Board* v. *Dionne*, [1978] 2 S.C.R. 191; *Attorney General of the Province of Quebec* v. *Kellogg's Co. of Canada*, [1978] 2 S.C.R. 211.

68. See, for example, the proposed Constitutional Amendment Bill, 1978 (Bill C–60), sections 62–70; Government of British Columbia Constitutional Proposals, Paper No. 3, *Reform of the Canadian Senate* (1978); Beige Paper, pp. 51–56.

69. See, for example, the proposed Constitutional Amendment Bill, 1978 (Bill C–60), section 97; Government of Alberta, *Harmony in Diversity: A New Federalism for Canada* (1978), p. 17.

70. See text pp. 198–203.

71. Provincialism, regionalism, and dualism are simply three different ways of viewing the allocation of powers to the provincial level of government in

Canada. Decentralization flowing from considerations of provincialism would require all the provinces to exercise the same new powers: for example, all the provinces might have an equal interest in obtaining the power to tax by indirect means. Decentralization flowing from considerations of regionalism would require the provinces in a single region to exercise the same new powers. The other provinces would not exercise these powers: for example, the Atlantic provinces might have a distinctive interest in obtaining jurisdiction over offshore minerals and energy resources. Decentralization flowing from considerations of dualism would result in Quebec obtaining new powers. No other province would be given these new powers: for example, Quebec might have a singular interest in obtaining jurisdiction over the broadcast media in Quebec.

72. In this part of the article, I shall consider the possible consequences for the Supreme Court of Canada of the recommendations flowing from considerations of nationalism, provincialism, and regionalism. I shall not, however, treat provincialism and regionalism separately because I think that the consequences for the Court are quite similar under both these circumstances. In addition I shall save my discussion of the consequences for the Court of recommendations flowing from considerations of dualism for the part of this article that deals with special status for Quebec (pp. 198–203) because the concept of dualism is premised on a view of federalism that attaches primary significance to the relationship between English Canada and French Canada.

73. Quebec, Royal Commission of Inquiry on Constitutional Problems, *Report* (1956), Vol. 3, Pt. 1, pp. 288–94.

74. See, for example, Constitutional Amendment Bill, 1978 (Bill C–60), sections 101–114; Government of British Columbia Constitutional Proposals, Paper No. 4, *Reform of the Supreme Court of Canada* (1978), p. 46.

75. See, for example, Canadian Bar Association, Committee on the Constitution, *Towards a New Canada* (Toronto: 1978), p. 55; Task Force on Canadian Unity, *A Future Together: Observations and Recommendations* (Ottawa: Minister of Supply and Services Canada, 1979), p. 100.

76. Even the Trudeau government, in the round of constitutional talks held in 1978, suggested that a number of powers exercised by the national government should now come under provincial jurisdiction. See Canadian Intergovernmental Conference Secretariat, *Proposals on the Constitution 1971–1978* (1978), pp. 277–86. One of the Clark government' s first actions after taking office was to work out agreements with the Governments of British Columbia and Newfoundland, by which Ottawa ceded its jurisdictional claims over offshore resources in those two provinces.

77. The only exception to this might be that the Court might permit governments of both levels to add to the protections in an entrenched bill of rights. See *Jones* v. *Attorney General of New Brunswick*, [1975] 2 S.C.R. 182.

78. See discussion above, p. 174.

79. The speeches of Sir John A. Macdonald in the Confederation Debates are clear evidence of this view. See note 6.

80. Macdonald's opinion was that they would not arise, that "we have avoided all conflict of jurisdiction and authority." See note 6.

81. See respectively sections 90, 91 (general clause), 92 (10)(c), and 91(1A) of the BNA Act, 1837, 30 & 31 Vict., c. 3. (U.K.)

82. Supreme Court Act, R.S.C. 1970, c. S–19. s. 4.

83. See, for example, Government of British Columbia Constitutional Proposals, Paper No. 4, *Reform of the Supreme Court of Canada* (1978), pp. 47–48; First Report of the Ontario Advisory Committee on Confederation, pp. 10–11; Canadian Bar Association, *Towards a New Canada*, p. 60; Task Force on Cnadian Unity, *A Future Together*, p. 101.

84. Canadian Constitutional Charter, 1971 (Victoria Charter, 1971), articles 26–32. The criticisms of the Victoria Charter model that follow are taken largely from Government of British Columbia Constitutional Proposals, Paper No. 4, *Reform of the Supreme Court of Canada* (1978), pp. 47–48. I participated in the writing of that paper.

85. The solution to this problem is to allow both levels of government to submit names to the nominating committee. See the *Final Report* of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada (1972), p. 39.

86. Some of the supporters are listed in note 83 above.

87. For a full description of the possible structure and jurisdiction of a reconstituted Senate, see Government of British Columbia Constitutional Proposals, Paper No. 3, *Reform of the Canadian Senate* (1978). See also First Report of the Ontario Advisory Committee on Confederation, pp. 7–9; Canadian Bar Association, *Towards a New Canada*, pp. 37–46; Task Force on Canadian Unity, *A Future Together*, pp. 96–99; Progressive Conservative Party, Discussion Paper No. 3, *The Constitution and National Unity*, pp. 6–9.

88. It is impossible to predict this with certainty. However, the fact that in the Senate there would be more participants in the appointment process and the possibility that there would be open confirmation hearings lead me to conclude that this process would be more open and likely more concerned with merits than the one-to-one *in camera* dealings of two Attorneys General.

89. The exception to this general rule is the Federal Court of Canada, whose jurisdiction is limited to the interpretation of federal law.

90. See Albert S. Abel, "The Role of the Supreme Court in Private Law Cases," *Alberta Law Review* 4 (1965), pp. 39–48.

91. See Peter H. Russell, "The Jurisdiction of the Supreme Court of Canada: Present Policies and a Programme for Reform," *Osgoode Hall Law Journal* 6 (1968), pp. 32–33. See also the *Final Report* of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada (1972), pp. 39–40.

92. Russell, "The Jurisdiction of the Supreme Court of Canada . . .," p. 3.

93. Abel, "The Role of the Supreme Court . . .," p. 45.

94. *Ibid*.

95. Government of British Columbia Constitutional Proposals, Paper No. 4, *Reform of the Supreme Court of Canada* (1978), p. 51.

96. Economic Council of Canada, *Regulation Reference: A Preliminary Report to First Ministers* (1978), p. 4.

97. It must be emphasized that in this paragraph I am talking about *similar* provincial legislation and the potential danger of different and conflicting judicial interpretations of that legislation if ten separate courts have ultimate appellate jurisdiction. A provincial appellate court, because it is limited to interpretation of a single statute, may not see that the statute is similar to those in other jurisdictions and may thus interpret it differently from other provincial appellate courts. Or it may even see the similarities, but decide that its interpretation is better than that of the other courts! Either way the goal of uniform legislation is sacrificed at the interpretation stage. On the other hand, the Supreme Court of Canada, because it may have to interpret some or all of these provincial statutes, should quickly perceive that they are similar and give them a single interpretation. Of course, if the provinces enact *different* legislation in an area, then no court, including the Supreme Court of Canada, should attempt to create a uniformity that simply is not there.

98. [1959] S.C.R. 121.

99. [1979] 4 W.W.R. 118.

100. [1977] 2 S.C.R. 1054.

101. [1977] 2 S.C.R. 654.

102. The alternative would be to allow the lower court to decide the jurisdictional issue along with the merits of the case. Assuming that the court's decision on the jurisdictional point could be appealed, if the court's decision were wrong, there would have been a great waste of time and money.

103. For a comprehensive description of the extent of the overlap, see the Three Reports of the Western Premiers' Task Force on Constitutional Trends (1977, 1978, 1979). For a good academic discussion, see Murray Beck, "Overlapping and Divided Jurisdictions: The Nub of the Debate," in R.B. Byers and R.W. Reford, eds., *Canada Challenged: The Viability of Confederation* (Toronto: Canadian Institute of International Affairs, 1979), pp. 17–37.

104. Ontario Law Reform Commission, *Report on Sale of Goods*, Vol. 1 (1979), p. 30, note 36.

105. *Ibid.*, p. 10.

106. See note 103 above.

107. See *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938).

108. See, for example, *Quebec North Shore Paper Co.* v. *Canadian Pacific Ltd.*, [1977] 2 S.C.R. 1054; *McNamara Construction (Western) Ltd.* v. *The Queen*, [1977] 2 S.C.R. 654; *Pacific Western Airlines Ltd.* v. *The Queen*, [1979] 2 F.C. 476 (Trial Div.); affd. [1980] 1 F.C. 86; *Foundation Company of Canada* v. *Canada and Thomas Fuller Construction Co. (1958) Ltd.*, (1980) 30 N.R. 249 (S.C.C.)

109. For a description of the problem of fragmented jurisdiction in the area of family law, see Payne, *A Conceptual Analysis of Unified Family Courts* (1973), pp. 30–43.

110. See note 12 above.

111. O.W. Holmes, "Law and the Court," in Julius J. Marke, ed., *The Holmes Reader*, 2d ed. (Dobbs Ferry, N.Y.: Oceana, 1964), p. 66.

112. See, for example, *Saumur* v. *City of Quebec*, [1953] 2 S.C.R. 299; *Henry Birks and Sons* v. *City of Montreal*, [1955] S.C.R. 799; *Switzman* v. *Elbling*, [1957] S.C.R. 285.

113. For critical commentary see MacPherson, "Developments in Constitutional Law . . .," pp. 111–30, 133–35.

114. The situation described below is based in part on *Abbott-Smith* v. *Governors of University of Toronto*, (1964) 45 D.L.R. (2d) 672 (N.S.S.C.)

115. (1973) 43 D.L.R. (3d) 239 (S.C.C.)

116. Canadian Bar Association, *Towards A New Canada*, p. 56.

117. Task Force on Canadian Unity, *A Future Together*, pp. 100–101.

118. See Gerald E. LeDain, "Concerning the Proposed Constitutional and Civil Law Specialization at the Supreme Court Level," *Revue Juridique Thémis* 2 (1967), pp. 109–19.

119. [That is, relating to or trained in Quebec civil law.]

120. Canadian Bar Association, *Towards a New Canada*, p. 58.

121. See Russell, *The Supreme Court of Canada*, p. 7.

122. See, for example, Jean-Louis Baudouin, "L'Interprétation du code civil québécois par la Cour suprême du Canada," *Canadian Bar Review* 53 (1975): 715–37; J.-L. Baudouin, "The Impact of the Common Law on the Civilian Systems of Louisiana and Quebec," in Edward Dainow, ed., *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions* (Baton Rouge:

Louisiana State University Press, 1974); Pierre Azard, "La Cour suprême du Canada et l'application du droit civil de la Province de Québec," *Canadian Bar Review* 43 (1965): 553–560.

123. Since 1965 there have been 139 appeals in Quebec civil cases. On 122 of these occasions, the Court has sat as a five-man bench with three civilian judges. See David Wheat, "Disposition of Civil Law Appeals by the Supreme Court of Canada," (1980) 1 *Supreme Court Law Review* 1 (1980): 425–55.

124. [1953] 2 S.C.R. 257.

125. This case is discussed in Edward McWhinney, "Legal Theory and Philosophy of Law in Canada," in Edward McWhinney, ed., *Canadian Jurisprudence: The Civil Law and Common Law in Canada* (Toronto: Carswell, 1958), p. 9.

126. Wheat, "Disposition of Civil Law Appeals . . ."

127. *Ibid.*, p. 430.

128. *Ibid.*, p. 432.

129. *Ibid.*, p. 446.

130. *Ibid.*

131. *Ibid.*, p. 447.

132. *Ibid.*, p. 448.

133. *Ibid.*, p. 450. The case is *Cameron* v. *Canadian Factors Corp.*, [1971] S.C.R. 148.

134. *Ibid.*, p. 451.

135. See Russell, *The Supreme Court of Canada*, pp. 1–24 *passim*.

136. Baudouin, "The Impact of the Common Law on the Civilian Systems of Louisiana and Quebec," p. 3.

137. Jules Deschênes, *The Sword and the Scales* (Toronto: Butterworths, 1979), p. 32.

138. The Court has exercised great restraint in hearing appeals in civil cases from Quebec in recent years. The number of cases heard by the Court in the late 1970s was, 1975: 31; 1976: 16; 1977: 9; 1978: 11; 1979: 5.

139. It should be emphasized that this works both ways: a civilian judge may bring a valuable perspective to a common law case.

140. [1979] 1 S.C.R. 790.

141. Note 2 above.

142. An alternative method would involve the creation of a separate civil law banc [bench], but not a separate common law banc, on the present Court.

143. I have discussed this and other proposals concerning Quebec's civil law in pp. 173–98 of this article. That discussion could appropriately be incorporated here, as well.

144. Major economic cases include *Reference Re Anti-Inflation Act*, [1976] 2 S.C.R. 373; *Canadian Industrial Gas and Oil Ltd.* v. *Government of Saskatchewan*, [1978] 2 S.C.R. 545; *Central Canada Potash Co.* v. *Government of Saskatchewan*, [1979] 1 S.C.R. 42; *Regina* v. *Dominion Stores Limited*, (1980) 30 N.R. 399 (S.C.C.); *Labatt Breweries* v. *Attorney General of Canada*, (1980) 30 N.R. 496 (S.C.C.). Recent decisions with significant implications for Canada-Quebec relations include *Jones* v. *Attorney General of New Brunswick*, [1975] 2 S.C.R. 182; *Capital Cities Communications Inc.* v. *Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141; *Public Service Board* v. *Dionne*, [1978] 2 S.C.R. 191; *Attorney General of the Province of Quebec* v. *Attorney General of Canada*, [1979] 1 S.C.R. 218; *Blaikie* v. *Attorney General of Quebec*, (1980) 30 N.R. 225 (S.C.C.)

145. One example was Premier Lévesque's oral response to the Supreme Court's decision in *Blaikie* (note 144 above), striking down some sections of Quebec's language legislation. Premier Lévesque called the decision "a cruel insult to French Canada."

146. See, for example, J.-Y. Morin, "A Constitutional Court for Canada," *Canadian Bar Review* 43 (1965): 545–52.

147. See, for example, the Beige Paper, p. 59.

148. The following description is a summary of the Morin proposals. See note 146.

149. Since I do not favour an even-numbered Court, the number of English Canadian and civilian judges could not be exactly equal. My own preference would be for a nine-judge court with four judges chosen from Quebec, one from the Atlantic provinces, one from Ontario, one from the Prairie provinces, one from British Columbia, and the ninth judge chosen from any of the five regions.

150. Task Force on Canadian Unity, *A Future Together*, p. 101; emphasis added. The word 'near-equality' in the passage refers to the fact that the task force recommended an eleven-person court with five judges from Quebec and six from English Canada.

151. See, for example, Edward McWhinney, *Constitutionalism in Germany and the Federal Constitutional Court* (Leyden: Sijthoff, 1962) and Archibald Cox, *The Role of the Supreme Court in American Government* (New York: Oxford University Press, 1976) for generally favourable reviews of the performance of the German and American final courts.

152. Donald P. Kommers, *Judicial Policies in West Germany: A Study of the Federal Constitutional Court* (Beverly Hills: Sage Publications, 1972), p. 9.

153. *Ibid.*, pp. 48–52.

154. In Germany, between 1951 and 1972, only thirty-eight of more than 26 000 cases heard by the Constitutional Court involved federal-state disputes. See Kommers, *Judicial Policies in West Germany*, pp. 163–64. In the United States there were no decisions by the Supreme Court in federal-state disputes from the end of the Second World War until 1976, when the Court ruled in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). In both countries the essence of constitutional adjudication in the highest courts is the resolution of government-citizen disputes in the context of entrenched bills of rights.

155. That is, to decide which legislative bodies hold the power to enact specific laws.

156. W.R. Lederman, "Thoughts on Reform of the Supreme Court of Canada," *Alberta Law Review* 8 (1970), pp. 9–10.

157. The analysis in this paragraph is largely taken from Government of British Columbia Constitutional Proposals, Paper No. 4, *Reform of the Supreme Court of Canada* (1978), pp. 49–50.

158. The four criticisms that I have just made have been directed towards the proposal for a specialist constitutional court that would hear nothing but constitutional cases. It is important to point out that the proposal for a constitutional panel on the current Court would not be as vulnerable to these criticisms. For example, the judges on such a panel would be the same judges who sat on other cases coming to the Court. Therefore they would be knowledgeable about a wider range of legal subjects and presumably would be able to use that knowledge when sitting on the constitutional panel.

159. See note 3.

160. A full description of the Quebec government's model for sovereignty-association is contained in that government's white paper. See note 3.

161. *Ibid.*, p. 52.

162. *Ibid.*, p. 53.

163. *Ibid.*, pp. 62–64.

164. *Ibid.*, pp. 61–62.

165. *Ibid.*, p. 62.

166. This description of the Court's jurisdiction is a very brief synopsis of Brown and Jacobs, *The Court of Justice of the European Communities*, pp. 73–123.

167. *Ibid.*, p. 9, emphasis added.

168. The Court of Justice of the European Communities is composed of a very high percentage of former politicians, public servants, and academics. See Brown and Jacobs, *The Court of Justice of the European Communities*, pp. 33–48.

169. Two of the judges of the original Coal and Steel Court of the European Communities were not lawyers. See Brown and Jacobs, *The Court of Justice of the European Communities*, p. 27.

170. The Court of Justice of the European Communities possesses this jurisdiction, which is called a 'preliminary ruling' jurisdiction. See Brown and Jacobs, *The Court of Justice of the European Communities*, pp. 131–49.

171. There would be interesting questions concerning the relationship between *the courts* of Canada and Quebec, on the one hand, and a possible Community Court on the other hand. In addition there would also be difficult questions involving the relationship between Quebec and Canadian *law* (domestic law) and community law. This latter relationship is beyond the scope of this paper, but it is worth mentioning that the tension between the treaty law of the European Economic Community and domestic law has been especially problematic in the United Kingdom because of the primacy of the principle of parliamentary sovereignty in that country. Since a new Canada, and presumably a sovereign Quebec, would probably also attach great significance to that concept, similar problems might well arise here under a sovereignty-association model. Would the 'associational treaty law' of the Canada-Quebec community take precedence over the domestic law of Canada and Quebec? Or would the principle of sovereignty-association mean that domestic legislation enacted after the treaty would take precedence over the treaty provisions in cases of conflict? In spite of inherent theoretical difficulties, I believe that the better view is that the community treaty law should take precedence. I agree with the position taken by the Court of Justice of the European Communities in the leading case of *Wilhelm* v. *Bundeskartellamt*, 14/68 (1969) *Common Market Law Reports* 101 at 119: "The E.E.C. Treaty instituted its own legal order, integrated into the legal systems of the member-States and which has priority before their courts. It would be contrary to the nature of such a system to accept that the member-States may take or maintain in force measures liable to compromise the useful effect of the Treaty. The imperative force of the Treaty and of the acts issued in implementation of it could not vary from State to State by the effect of internal acts, without the functioning of the Community system being obstructed and the attainment of the aims of the Treaty being placed in peril."

For discussion of the relationship between EEC law and domestic law, including domestic constitutional law, see Lawrence Collins, *European Community Law in the United Kingdom* (London: Butterworth, 1975), pp. 1–63. See also Gerhard Bebr, "How Supreme Is Community Law in the National Courts?" *Common Market Law Review* 11 (1974): 3–37.

172. There is already a European precedent for transnational human rights legislation with a distinctive judicial body to enforce it. The Council of Europe is a regional organization of domestic Western European countries, which was established in 1949 to promote European unity. The Council adopted the European Convention of Human Rights in 1953 and created a European Court

of Human Rights to try cases brought pursuant to the Convention. For discussion see Buergenthal and Torney, *International Human Rights and International Education.* (Washington, D.C.: U.S. National Commission for UNESCO, 1976). pp. 67–71.

173. See note 4.

174. I have tried to do that in two places. See J.C. MacPherson, "Brief to the Task Force on National Unity, 8 February 1978" and "Brief to the Special Senate-House of Commons Committee on the Constitution of Canada, 8 September 1978."

175. See text pp. 173–98.

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Prior Claims: Aboriginal People in the Constitution of Canada

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Prior Claims: Aboriginal People in the Constitution of Canada

Introduction

In 1969 the Government of Canada proposed the ending of Indian special status. Both the Indian Act and section 91(24) of the British North America (BNA) Act, which gives the Parliament of Canada jurisdiction over Indians and Indian lands, were to be repealed.[1] But much has happened in the years since 1969. Governments have confirmed their commitment to preserving section 91(24). Various Ministers of Indian Affairs have stated their intention to strengthen Indian local government. Land-claims negotiations have taken place in parts of the country, and one comprehensive settlement has been concluded. In January 1981 the three federal political parties agreed that the Constitution should recognize the aboriginal and treaty rights of the Indian, Inuit, and Métis peoples of Canada. This agreement seemed both the culmination of a decade of political evolution and a new beginning. Ten months later the section was dropped in the federal-provincial compromise that produced an agreement on constitutional change. After heated debate and public Native demonstrations, federal Justice Minister Jean Chrétien who, as Minister of Indian Affairs, had proposed the ending of special status in 1969, announced in the House of Commons on 23 November 1981 that nine provinces and the federal government had agreed to restore the aboriginal- and treaty-rights section, with the modification that it was to apply only to 'existing' rights. While the section represents a significant constitutional advance, the events of November 1981 have demonstrated a continuing ambivalence and uncertainty in Canadian discussions of aboriginal policy.

The 1970s

The 1971 report of the MacGuigan-Molgatt committee recognized that Canada's aboriginal peoples should be heard in any discussions on constitutional change, though the report left open the question of whether change should foster special status or equality. It recommended that the place of the Indian, Inuit, and Métis peoples be recognized in the preamble of a new constitution "as a means of reaffirming the special obligation that Canadians feel towards the native peoples of this land."[2] When Prime Minister Trudeau reopened the question of patriation a few years later, Indians tried to assess its meaning for them.[3] The annual assembly of the Federation of Saskatchewan Indians in 1976 stated its opposition "to any policy, by the Government of Canada, directed at repatriation of the B.N.A. Act, which would derogate from or jeopardize the historical relationships, protections and guarantees given by her Majesty the Queen to Her Indian People."[4]

In 1978 the National Indian Brotherhood began to demand participation in the First Ministers' meetings on the Constitution. Representatives of the three national aboriginal organizations were invited to attend as observers the First Ministers' meeting in October 1978. Noel Starblanket, head of the Brotherhood, commented that he could have seen the conference just as well on television. The organizations were again invited to attend the First Ministers' meeting of February 1979, but most sessions were closed to observers.

The Constitutional Amendment Act, introduced in 1978 by the federal government, included a provision to ensure that the bill's Charter of Human Rights did not end Indian rights based on the Royal Proclamation of 1763.[5] Although the provision was criticized as inadequate, it indicated some concern with Indian questions. The white paper, *A Time for Action*, released by the federal government at the same time, stated: "The renewal of the Federation must fully respect the legitimate rights of the native peoples, recognize their rightful place in the Canadian mosaic as the first inhabitants of the country, and give them the means of enjoying full equality of opportunity."[6]

The 1978 Canadian Bar Association's constitutional study, *Towards a New Canada*, stated that "we must scrupulously abide by our agreements with the native peoples and recognize their claims as they are established. Indeed constitutional recognition of our commitment to abide by our obligations should be expressly set forth in the Constitution."[7] The report of the Pepin-Robarts Task Force on National Unity, *A Future Together*, recognized "native sovereignty" as one of the options facing Canadians. It described that option as follows: "Although formulations vary, native sovereignty usually entails the exercise of the principle of self-determination through the creation of autonomous institutions within the Canadian federal system. The native communities possessing these institutions would receive a land and resource base adequate to provide a decent standard of life." The report concluded that aboriginal people must be involved in the process of constitutional renewal: "both provincial and federal authorities should pursue direct discussions with representatives of Canada's Indians, Inuit and Métis, with a view to arriving at mutually acceptable constitutional provisions that would secure the rightful place of native people in Canadian society."[8]

At a First Ministers' meeting in February 1979, Prime Minister Trudeau proposed that "Canada's Native Peoples and the Constitution" be added to the agenda. All provincial premiers agreed without extensive discussion. A press release issued by the Prime Minister's Office after the conference stated: "The Prime Minister says he attaches particular importance to the item which concerns the place of Canada's native peoples in a new Constitution. He said he hoped that representatives of the native peoples would participate in the work on this question." Mr. Trudeau later said it had been "agreed that native representation would meet with the First Ministers" on the new agenda item.[9]

The National Indian Brotherhood led a delegation of between 250 and 300 Chiefs and Elders to England in July 1979 to ask the Queen and the English Parliament to refuse 'patriation' of the BNA Act until Indians had been involved in the constitutional discussions and Indian rights were guaranteed in a new constitution. While the delegates did not meet with the Queen or with members of the Cabinet, they did meet with the Leader of the Opposition, and from both the House of Commons and the House of Lords came support from individuals associated with Britain's three major parties.[10]

In September 1979 the leadership of the National Indian Brotherhood met with Prime Minister Clark, who pledged that Natives would have "full, equal and ongoing participation" in the constitutional talks on all matters directly affecting them.[11] To work out the basis for this participation, representatives of the three national aboriginal organizations met on 3 December 1979 with the steering committee of the Continuing Committee of Ministers on the Constitution. Shortly after that meeting the Clark government fell, and any constitutional negotiations were suspended for the duration of the election campaign. Late in 1979 the Quebec government issued its white paper on sovereignty-association, *Québec-Canada: A New Deal*. It stated: "The Amerindian and Inuit communities, if they so desire, will be in full possession on their territory of institutions that maintain the integrity of their societies and enable them to develop freely, according to their own culture and spirit."[12] Premier Lévesque later stated: ". . . whatever the new status given to Quebec, the Quebec constitution will provide for the recognition and the protection of the rights and privileges already given to the Amerindians and Inuit by treaties, various understandings, and legislation. That is a strict minimum; a minimum that will be guaranteed under Quebec's constitution."[13] In January 1980 the Constitutional Committee of the Quebec Liberal Party issued a proposal entitled *A New Canadian Federation*. It stated of the Indians and Inuit:

> Their participation in Quebec and Canadian life will be a matter for future discussion and negotiation with them. In any constitutional reform, the native peoples must become the authors of their own destiny, and not mere subjects of jurisdiction.
>
> We believe, however, that constitutional reform should recognize the existence of these groups. It should also recognize specific rights in linguistic, cultural and educational matters, as we have outlined in the chapter on fundamental rights. A revised constitution should provide that treaties negotiated with the native peoples take precedence over legislation. Finally, it should respect their special hunting and fishing rights.[14]

In February 1980 Mr. Trudeau was returned to office as Prime Minister. He confirmed aboriginal participation in the constitutional talks in a speech to a national all-chiefs' conference in Ottawa on 29 April 1980. He later affirmed:

> I was very pleased on April 29th to have had an opportunity to reaffirm the federal government's commitment to the continued involvement of Indian, as well as Inuit and Metis, people in constitutional discussions. As I said at that time, the federal government endorses direct participation by the Indian leadership at the table with governments on those constitutional matters which directly affect Indian people. I then went on to refer to five subjects of special importance which had earlier been suggested by Indian, Inuit and other native leaders which we would see as falling within the scope of the item on "Canada's Native Peoples and the Constitution": aboriginal rights, treaty rights, internal native self-government, native representation in political institutions and the responsibilities of the federal and provincial governments for the provision of services to native peoples.[15]

In the April speech the Prime Minister also announced that funding of over $1.2 million would be provided by the federal government to the three national organizations to allow them to develop their constitutional positions.

The federal government released a draft preamble, or statement of principles, for a new constitution at the beginning of ministerial meetings in July 1980. The draft expressed the resolve to create a new constitution that "shall enshrine our fundamental freedoms, our basic civil, human and language rights, including the right to be educated in one's own language, French or English, where numbers warrant, and the rights of our native peoples, and shall define the authority of Parliament and of the legislative assemblies of our several provinces."

The Continuing Committee of Ministers on the Constitution held a series of meetings over the summer of 1980. Early in those meetings a subcommittee was established to meet with representatives of the national aboriginal organizations. That meeting occurred in Ottawa on 26 August 1980, but had a very limited function.

After the failure of the First Ministers' meeting of September 1980, the federal government, on 2 October, announced its constitutional proposals. As in the 1978 proposals, the only provision on aboriginal peoples was a section designed to protect aboriginal rights from the egalitarian provisions of the Charter of Rights:

> 24. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada, including any rights or freedoms that pertain to the native peoples of Canada.

Section 15, dealing with equality, was also qualified by a subsection (2) that read: "This section does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged persons or groups."

The government proposals went to a Special Joint Committee of the Senate and House of Commons that held hearings in late 1980 and early 1981. The groups appearing before the committee generally favoured a strengthening of the Charter of Rights and Freedoms. The three national aboriginal organizations appeared before the committee, and each proposed identical wording to recognize aboriginal and treaty rights and rights of self-determination, and to accord the aboriginal groups a veto on constitutional changes affecting their rights. The government had said that it would not entrench aboriginal and treaty rights, arguing that the terms were not adequately defined. This same problem was cited as a reason for rejecting provisions relating to the handicapped. But opposition to the government's unilateral proposals was so strong that it prompted the government to seek ways of attracting support. This search led to concessions relating to the rights of Native people, the handicapped, and women. In hasty and emotional public bargaining, representatives of the three national political parties and of the three national aboriginal organizations agreed to new provisions on 30 January 1981. A new section 34 read:

> (1) The aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.

In addition section 25 was altered to read:

> The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
>
> (b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

A third change required the involvement of representatives of the Aboriginal Peoples of Canada in one of the federal-provincial constitutional conferences that is to be called after 'patriation'.[16]

The changes that were agreed upon made no reference to aboriginal self-determination or to an aboriginal role in the amending process. A provision relating to self-determination is hard to formulate. Agreement on this item would certainly have required a different bargaining process from the one that was used. In contrast, an aboriginal role in constitutional amendments would have been easy to formulate, but neither proposal was acceptable to the federal government.

The federal government had second thoughts on the new sections and circulated an additional provision on Monday, 2 February that would have allowed the amendment of section 34 in relation to an individual province by an agreement between that province and the federal government. In the northern territories, however, an amendment would require only federal action. This proposal outraged the representatives of both the Native organizations and the opposition political parties, and was hastily withdrawn.

Within days of the 30 January agreement, the provincial and territorial Indian organizations, the constituent members of the National Indian Brotherhood, began to challenge the Brotherhood's approval of the new sections. To non-Indian observers, the Brotherhood seemed to have achieved a substantial victory. In the view of the provincial and territorial Indian leaders, the Brotherhood had usurped authority by acting without consulting them and had agreed to accept 'half a loaf'. In April 1981 the Brotherhood officially reversed its position, coming out in opposition to the government's constitutional package. That same month the Native Council of Canada indicated its opposition to the package unless it included an aboriginal veto on amendments to the Native rights sections. On 23 April the House of Commons adopted an amendment making it clear that the Native rights sections could only be amended by the general amending formula.[17] This put to rest the federal proposals of 2 February. The aboriginal people still had no role in the amending formula, and the opposition of the National Indian Brotherhood and the Native Council of Canada continued. Only the Inuit maintained their support for the package of 30 January.

From October 1980 to March 1981, the Native Council of Canada held six regional hearings on the Constitution. The final report, entitled *Native People and the Constitution of Canada*, stated: "The constitution should recognize the existence of Indian, Inuit and Metis collectivities and their right to develop in accord with their own aspirations."[18] The report rejected a system of special status for Métis parallel to that in existence for status Indians. It proposed special Native seats in the House of Commons (a system modelled on that of New Zealand), an aboriginal veto on constitutional amendments affecting their rights, and a confirmation of federal jurisdiction over Métis and non-status Indians.

The federal government never acknowledged publicly the opposition of Indians and Métis to the constitutional package. While the head of the Indian Association of Alberta stated that the Government of Alberta had contributed $40 000 to Indian lobbying efforts in England,[19] there was no public response by the provincial governments to Indian opposition to the federal constitutional package. Indian opposition was outside the ambit of support by Canadian politicians.

In May 1981 a delegation of Indian chiefs from Alberta went to London to begin a new round of lobbying in the United Kingdom. Representatives of both the Indian Association of Alberta and the Union of British Columbia Indian Chiefs explored the possibility of a court challenge in England. With the exception of the Four Nations Confederacy of Manitoba, the Indian organizations did not participate in the challenge to the patriation package that was heard by the Supreme Court of Canada in April and May of 1981. Political activity on the constitutional issue died down in Canada during the months when the issue was being considered by the Supreme Court of Canada. After the decision of the Court on 28 September, Indian political activity resumed. Indians travelled to an international human rights conference in Geneva, to the Commonwealth conference in Melbourne, Australia, and then returned to London. The Supreme Court's judgment put pressure on the federal government to hold another First Ministers' meeting, and one was held in the first week of November. The Charter of Rights was modified by the 'override' provision; the amending formula was changed; and section 34 dealing with aboriginal and treaty rights was dropped. Reports of Trudeau's reaction to the deletion of the section differed,[20] though he later described the compromises as a personal defeat. Within days of the 5 November agreement, there was confusion about who had opposed section 34. Justice Minister Jean Chrétien explained that the section had been dropped because the Indians and the Métis were not satisfied with it, and the parties would have to go back to their drawing boards to see if they could work out wording that was acceptable. But Prime Minister Trudeau stated that the section had been dropped because seven premiers had opposed it. Premier Blakeney of Saskatchewan then stated that only two or three premiers had opposed the section, adding that he had not been one of these. Media coverage identified British Columbia and Alberta as the major provinces opposed. Premier Lougheed of Alberta acknowleged that he opposed section 34. His reason repeated the earlier federal objection: the rights involved were not sufficiently defined. On 17 November Premier Bennett of British Columbia stated that he had not participated in any discussions on section 34. This confirmed accounts that he had not been involved in the negotiations leading to the final compromise. On 19 November both the federal Progressive Conservative Party and the New Democratic Party (NDP) announced support for the restoration of the aboriginal- and treaty-rights section. Leader of the NDP, Ed Broadbent, stated that his party's support for the reform package was contingent on resolving the issues of women's rights and aboriginal rights. The same day there were Indian demonstrations in Ottawa, Edmonton, and Vancouver. In Vancouver Indians occupied the Museum of Anthropology on the campus of the University of British Columbia, where they stayed the night before heading to the annual convention of the Social Credit Party in downtown Vancouver. At the convention, almost simultaneously, an Indian leader addressed the delegates while Premier Bennett, in a separate room, announced that British Columbia supported the restoration of section 34. He explained that the Indians had previously opposed section 34, but had now changed their minds. For that reason British Columbia was now supporting the restoration of the section. The largest demonstration occurred in Edmonton, where over 4000 Indians rallied in front of the provincial Legislature. One day later Premier Lougheed agreed to a modified section 34, entrenching 'existing' aboriginal and treaty rights. If Manitoba was a third opposing province, the defeat of Premier Sterling Lyon in the provincial election and the victory of Howard Pawley meant support from Manitoba for the restoration of section 34. Another provincial actor was identified: it became public that Ontario had written to the federal government during the summer urging that the section be dropped. But even with this disclosure, Ontario was not identified with the provinces whose premiers opposed the section in the November debates.

On 23 November 1981 federal Justice Minister Jean Chrétien announced in the House of Commons that nine premiers had agreed on the restoration of section 34 with the addition of the word 'existing'. The new wording was not put forward (as the wording of 30 January had been) on the basis of an agreement with aboriginal leaders. Chrétien said his lawyers had informed him that the addition of the new word did not alter the section. He explained that what had been 'implicit' in the section was now being made 'explicit'. Within a few days the leaders of the major aboriginal organizations had all rejected the addition of 'existing' as seriously weakening the section. The new wording went forward solely on the basis of an agreement between non-aboriginal political leaders.

In spite of the unanimous opinion, put forward in the studies and proposals already described, that a new constitution should address aboriginal questions, the political bargaining between the provincial and federal governments in the years between 1978 and 1981 did not provide an adequate forum for the discussion of aboriginal rights questions. During this period the aboriginal organizations were able to achieve a significant degree of recognition from Canadian politicians. An inadequately negotiated compromise was the result. Initially the compromise appeared to be a significant achievement for the aboriginal organizations. But by the spring of 1981 these organizations had shown their unwillingness to compromise and a seemingly doctrinal opposition to 'patriation'. Why was that? Perhaps, like Lévesque, they had to lose in order to sustain the political tension that is basic to their struggle for self-determination. Perhaps, like the Western provinces, they felt compelled to continue to fight in order to consolidate or advance the political power that they have only recently experienced in Canadian political life. They did not try to protect the gain that had been achieved. Such a strategy did not seem necessary, for the federal government, both in Canada and in Britain, was describing the treaty- and aboriginal-rights section as a positive part of the package. And the provinces had said nothing. The provinces had political problems in openly criticizing parts of the federal package. They did not want to be seen as opposing the egalitarian rights set forth in the charter. They criticized the charter indirectly, on the basis both of the process being used and of the shift of power to the courts that would follow. They did not criticize the treaty- and aboriginal-rights section directly or indirectly. Only in private negotiations could the matter be discussed. And the final agreement, signed on 5 November, made no reference to section 34. It described what had been accepted and, by omission only, what had been deleted. It was handled self-consciously as a piece of dirty work. When effective opposition to the dropping of section 34 emerged, certain premiers reversed their positions. Premier Bennett justified his reversal on the basis of a change in the attitude of aboriginal leaders to section 34. But public statements do not identify any aboriginal leader whose position on section 34 changed in the fall of 1981. Premier Lougheed justified his province's change on the basis of a modification in the wording of the section. But he had objected to the undefined character of aboriginal and treaty rights. No one has suggested that the addition of the word 'existing' has served to define the meaning of those terms. Both premiers were seeking face-saving formulas to justify a reversal of their positions.

This review of events is an introduction to a survey of Canadian Indian policy. I shall examine the constitutional history and the issues of aboriginal rights, treaties, Indian reserves, and the definition of the population groups involved. I shall then turn to the issue of the extent to which Indians and Indian lands are exempt from the application of provincial laws and the scope of Indian self-government. Finally, I shall attempt to describe the nationalism of current aboriginal political thought in Canada and speculate on the future direction of aboriginal policy in Canadian legal and political life.

The Constitutional History

The colonial encounter between Europeans and the Indian tribes of North America was complex and is still incompletely understood.[21] British policy appears to have its origins in the practical reality of colonization in the New England area. The strength of the tribal populations and the extent of specific land use by the Indians meant that colonial settlement had to be based on some form of agreement with them. The initial English charters and grants made no mention of the indigenous populations. In practice this left the task of dealing with the tribes in the hands of the local colonial officials. The pattern developed of signing treaties with the tribes to acquire land and jurisdiction. In the latter part of the eighteenth century, England, facing increasing problems, tried to centralize control over aboriginal policy. This effort at centralization involved the Albany Congress, the creation of two superintendencies of Indian affairs in 1756, and the Royal Proclamation of 1763. Centralization of authority was continued in the United States after the revolutionary war. The American Constitution was not explicit on this point, but judicial decisions in the early nineteenth century upheld extensive federal jurisdiction. The *Report of the Select Committee on Aborigines (British Settlements)* in England in 1837 advocated that the Imperial government retain centralized control over indigenous policy to protect the tribes from adverse local interests. The conclusion of the English report was quoted with approval in a Province of Canada report in 1847. That report advised: "As long as the Indian Tribes continue to require the special protection and guidance of the Government, they should remain under the immediate control of the Representative of the Crown within the Province, and not under that of the Provincial Authorities."[22]

By 1867 the basic elements of Canada's Indian policy were in place. A 'reserve' system already existed in each of the uniting provinces, and out of that system had developed both a government department and special legislation concerned with the system. The use of treaties to acquire land had become established since the Royal Proclamation of 1763, but only in the area of new colonial settlement, that is, today's Southern Ontario. Against this background Canadian officials decided that the BNA Act of 1867 should specify centralized authority over "Indians, and Lands reserved for the Indians." To the extent that there was, indeed, a theory or principle behind the decision in favour of centralized authority, that theory would have embodied the idea that the more distant level of government would better protect Indians against the interests of local settlers. While Indians were commonly seen as 'problems', they were understood by political leaders to be the victims of colonial expansion. The idea of their need for protection was well established.[23] It is to this tradition that we owe section 91(24) of the BNA Act.

Special provisions have been written into a number of constitutional documents since 1867. The Manitoba Act of 1870, section 31, recognized a 'Half-Breed' claim to Indian title and provided for a system of land grants to the Métis families in the new province.[24] The order in council admitting Rupert's Land and the North-Western Territory into the Union provided that "any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and the Company shall be relieved of all responsibility in respect of them."[25] The Terms of Union under which British Columbia joined Canada in 1871 provided that "the charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union."[26] The section goes on to make some skeletal provisions for the completion of the reserve system in the province.

The northern areas of the Provinces of Quebec and Ontario were transferred to those provinces in 1912. Both the Quebec Boundaries Extension Act and the Ontario Boundaries Extension Act contained the provision that the province "will recognize the rights of the Indian inhabitants in the territory above described to the same extent, and will obtain surrenders of such rights in the same manner, as the Government of Canada has heretofore recognized such rights and has obtained surrender thereof. . ." The province was to bear the costs of obtaining the surrender, which would require the approval of the federal executive before it became effective. As well "the trusteeship of the Indians in the said territory, and the management of any lands now or hereafter reserved for their use, shall remain in the Government of Canada subject to the control of Parliament."[27]

In 1930 the federal government transferred Crown ownership of lands and natural resources to the governments of the three Prairie provinces. The agreements were given force by the BNA Act of 1930. Special provisions were inserted in relation to Indian reserve lands. The Indians also obtained constitutional protection for their right to hunt and fish for food in those provinces.[28]

There are constitutional provisions relating to Indians in all the areas of Canada that were added after 1867 except for Prince Edward Island, Newfoundland, and Labrador.[29]

The report of the Task Force on National Unity noted that "native people as a people have enjoyed a special legal status from the time of Confederation, and, indeed, since well before Confederation."[30] Mr. Justice Berger commented in the *Report of the Mackenzie Valley Pipeline Inquiry* that special status for Indian people has been "an integral part of our constitutional tradition."[31] This tradition of special status was challenged by the egalitarian orientation of human rights thought in the period following the Second World War. The first challenge took the form of the ill-fated government white paper of 1969.[32] The second challenge lay in litigation attacking provisions of the Indian Act on the ground that they were in conflict with the Canadian Bill of Rights. In 1969 the Supreme Court of Canada rendered inoperative one of the liquor sections of the Indian Act in the famous *Drybones* decision.[33] Four years later, however, in the *Lavell* case,[34] the Court refused to rule against sexual discrimination in the membership system. Since that time the courts have left the Indian Act undisturbed.[35]

Patterns of thought on the issues of individual and group rights have shifted both nationally and internationally. The promotion of human rights and fundamental freedoms was a basic purpose of the United Nations. There were achievements on questions of individual rights during the first decades of that world organization, but no movement on minority rights. That orientation has now shifted, and both themes are important in the 1980s. In Canada, too, concerns with equal rights have been supplemented by policies of bilingualism and multiculturalism. In this evolution hostility to the special status of Indians has been replaced by some degree of support for Indian collective rights.

In July 1981 the Human Rights Committee of the United Nations, established under the International Covenant on Civil and Political Rights, ruled against Canada in the *Lovelace* case.[36] As in the *Lavell* case, the membership provisions of the Indian Act were challenged on the ground that they discriminated on the basis of sex. Rather than ruling on egalitarian grounds, the Committee was concerned with avoiding any challenge to the reserve system or to the special legislative régime for reserve communities found in the Indian Act. They accepted the goal of protecting the collective rights of Indian tribes as ethnic minorities and ruled that the exclusion of Mrs. Lovelace from her home community was not necessary in order to protect the tribal entity. They were able to reconcile, in a narrow ruling, the egalitarian and collective rights claims that were involved in the case, something the Canadian Supreme Court had been unable to do eight years earlier.

Aboriginal Rights

As Mr. Justice Judson commented in the Supreme Court of Canada in the *Calder* case: "When the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries."[37] To what extent does Canadian law recognize the legal order established by the Indian societies before European settlement?

Canadian law recognized that the Indians were "organized in societies" and responded to them as organized groups. The Royal Proclamation of 1763 referred to the "several nations or tribes of Indians with whom we are connected, and who live under our protection. . ." The treaties were made between representatives of the Crown and leaders representing Indian tribal groups. Indian legislation and the reserve system involved the formal definition of groups of Indians as bands that had certain rights of self-government on band-reserve land. Native people argue that one of their aboriginal rights is a right to continue as self-governing communities. None of the treaties deals expressly with this question. The Indian Act recognizes band governments that are either traditional or have been established in accordance with the Act. In either case it defines rather limited legislative powers for the band government.

The question of a separate Indian political and legal order within Canada has only rarely been raised in the courts. The question of making "individuals of the Indian Tribes amenable to our Laws for Offences committed amongst themselves" was sufficiently unclear in Upper Canada in 1823 that a special opinion was sought from England. In the absence of any treaty provision on the question, England advised that the criminal law in place in Upper Canada applied to the offence.[38]

The idea that Canada lacked legislative jurisdiction over Indian reserve communities, or that Canadian jurisdiction was limited, was tested in two cases in the 1950s. In the *Lazare* case[39] the Caughnawaga Band argued that the federal government lacked the ability to expropriate parts of their reserve. The argument is not clearly stated in the judgment, but appears to have been based on the original grant of the lands by the French Crown. The Quebec Superior Court upheld federal legislative competence. In 1959, in the *Logan* case,[40] the Ontario High Court rejected the claim by the confederacy group on the Six Nations Reserve in Ontario that the Six Nations continued to be allies of the Crown and were not subjects. The Court ruled that the Six Nations had accepted the protection of the Crown when, after the American revolutionary war, they emigrated to Canada and settled on land granted to them by the Crown. By accepting the protection of the Crown, they owed allegiance to the Crown and became subjects.

These cases dealt in narrow ways with the question of Indian rights to self-determination. The 1823 case dealt with criminal activity off a reserve (and therefore outside any Indian unit of self-government). The *Lazare* and *Logan* cases held that provisions of the federal Indian Act dealing with the taking of reserve lands were valid and applied to the reserves in question. Indians were held to be subjects and under the legislative jurisdiction of Parliament. No comments were made about the idea that Indian self-government might be an aboriginal right that could exist apart from the provisions of any treaty or statute. By upholding the provisions of federal legislation, the courts went no further than to rule that Indian self-government is subject to federally imposed limitations.

Indians and Inuit had organized societies with their own systems of law. Does Canadian law recognize rights that were established under those systems of law? The history is mixed. Indian customary marriages were recognized on occasion by Canadian courts and, until 1951, were recognized in the administration of Indian affairs.[41] Indian and Inuit customary adoptions have been recognized by the courts in the Northwest Territories on the basis that custom is a source of law in the common law tradition.[42] Justifications of crime that were valid in traditional Indian society have been rejected as defences in criminal cases, though considered relevant in the mitigation of sentence.[43]

Aboriginal rights claims are often thought to be limited to land claims or the right to use particular lands for hunting and fishing. The claims to land are, logically, a claim to the recognition of a set of legal rights established under Indian and Inuit customary law, a law that has validity because Indian and Inuit communities had a full right of self-government. The Canadian cases that deal with aboriginal rights to land do not place the issue in this larger framework. Nor do they describe aboriginal title claims simply as a form of prescriptive claim familiar to English real property-law traditions. Aboriginal title is treated as a special doctrine without a larger context either in indigenous or colonial law. This lack of a theoretical basis for aboriginal rights has led to a focus on historic acts of recognition of aboriginal rights by the colonial legal system. In this way the

Royal Proclamation of 1763, which recognized Indian rights as pre-existing and defined the process of ending Indian title by treaty, became a source of rights.[44] In addition there has been a tendency in Canadian and American law to see the treaties as a source of Indian rights. This has led to the situation where tribes that surrendered their traditional territories have more rights than tribes that did not. This paradox was noted by the Supreme Court of Canada in a hunting-rights case where non-treaty Indians were held to have fewer rights that treaty Indians.[45] In spite of these paradoxes, the Royal Proclamation and the treaties mean that Indian title has been recognized in Canada during most of the nation's history and for most of its territory.

The Judicial Committee of the Privy Council ruled in 1888 that the Indians in the Treaty 3 area had, before the treaty, a "personal and usufructuary[46] right, dependent upon the good will of the Sovereign. . ."[47] The Judicial Committee attributed that right to the terms of the Royal Proclamation of 1763. The 'personal and usufructuary' terminology was continued in a series of judicial decisions dealing with reserve lands, but the question of an Indian title to unsurrendered lands did not arise again in Canadian courts until the *Calder* case, decided by the Supreme Court of Canada in 1973.[48] *Calder* dealt with the question of whether a tribe in British Columbia that had never surrendered its traditional territories continued to hold an aboriginal title to the land. The Supreme Court of Canada split evenly on the question. Three judges ruled that any Indian title had been extinguished by general land legislation passed in the colony before Confederation. Three judges ruled that title could only have been extinguished by express legislation or by agreement, and neither had occurred. The seventh judge confined his decision to a technical point, and his judgment was part of a majority ruling against the Indian claim. Since the *Calder* case, the Supreme Court of Canada has been able to avoid any substantive comment on aboriginal title claims.[49] The *Kanatewat* case[50] in Quebec challenged the James Bay hydro-electric project on the basis of unextinguished aboriginal rights. The issue was resolved in the end by a negotiated settlement. In 1979 the Trial Division of the Federal Court ruled on an Inuit claim to aboriginal title in the Baker Lake area of the Northwest Territories.[51] The court upheld Inuit aboriginal rights, but narrowed them to the traditional use of land, a ruling that confused the method of proving aboriginal title with the content of the title once proven.

The federal government issued a policy statement in 1973 on aboriginal title claims. It undertook to negotiate settlements of aboriginal title claims in major non-treaty areas of the country.[52] Since that time negotiations have been under way in parts of Canada, mainly in the northern territories.

The Treaties

The earliest Indian treaties in Canada were the treaties of peace and friendship that were struck in the Maritime provinces in the early eighteenth century and that dealt with political relations.[53] The Royal Proclamation of 1763 formalized the treaty-making procedure by confirming a Crown monopoly on the purchase of Indian lands and requiring a public assembly of the Indian population involved. Although the Proclamation applied to unacquired areas in the existing colonies, in practice the treaty policy was applied only in areas of new colonial settlement, beginning in Southern Ontario. The treaty policy was continued in the West by the federal government after Confederation.[54] In the Western treaties the government declared its desire to open up the area for settlement and to ensure peace and goodwill. The Indians surrendered all their territories, and the federal government promised to establish reserves on the basis of one square mile (approximately 260 hectares) per family of five. The reserve lands were "to be administered and dealt with for [the Indians] by her Majesty's Government of the Dominion of Canada. . ."

The treaties are fairly minimal documents. While they have some explicitly political aspects, the main provisions of the written versions are the surrender of land by the Indians and government promises of reserves, annuities, education, agricultural assistance, and hunting and fishing rights. There are discrepancies between government records of treaty negotiations and the written text of the treaties. We now have well documented descriptions of the Indian understandings of certain treaties, understandings that are markedly at variance with the written versions.[55] The question of the correct content of the treaties is now understood, but is far from being resolved.

The *St. Catherine's Milling* case, decided by the Judicial Committee of the Privy Council in 1888, described the property consequences of an Indian treaty. The treaty had been effective in ending the Indians' "personal and usufructuary right" to their traditional lands. The *Robinson Annuities* case,[56] decided by the Judicial Committee in 1896, dealt with the character and enforceability of treaties. A decision reached by arbitration asserted that the treaties were in the nature of international compacts and, for that reason, should be liberally construed. The Judicial Committee of the Privy Council neither accepted nor rejected that proposition: "That rule when rightly applied, in circumstances which admit of its application, is useful and salutary, but it goes no farther than this, that the stipulations of an international treaty ought, when the language of the instrument permits, to be so interpreted as to promote the main objects of the treaty. Their Lordships venture to doubt whether the rule has any application to those parts, even of a proper international treaty, which contain the terms of an ordinary mercantile transaction, in which the respective stipulations of the contracting parties are expressed in language which is free from ambiguity."[57] The Judicial Committee held that the annuity payments were an obligation of the federal, not the provincial, government. Their Lordships stated that the Indians had received, under the treaty, "a promise and agreement, which was nothing more than a personal obligation by its governor, as representing the old province, that the latter should pay the annuities as and when they became due . . . Seeing that the substantial question involved in these appeals is that of contract liability for a pecuniary obligation, they are of opinion that the rule followed by them in some really international questions between Canadian Governments ought not to apply here."[58] The treaty promises in question were treated as private law obligations arising out of contract. As with other contracts involving the federal government, the agreement was with the Crown, represented in the preceding quotation by the governor. In two subsequent cases Indians were able to enforce treaty provision in the courts. In *Henry* v. *The King*[59] the Exchequer Court held the Crown liable for annuity payments under the "treaty or contract" between the Crown and the Indian group. In *Dreaver* v. *The King*[60] the Exchequer Court ruled that the government could not deduct the costs of medicines supplied to Indians from their band funds when they had promised in the treaty to supply a "medicine chest."

In 1956 the Supreme Court of Canada decided the *Francis* case on the question of whether Indian exemptions from customs duties, promised by the Jay Treaty of 1794, were in effect in Canada. The Jay Treaty, struck between Britain and the United States, established the border in Eastern Canada. One argument was based on section 88 of the Indian Act, which gives some legal force to treaty provisions. Mr. Justice Kellock, in a judgment in which one other justice concurred, commented: "I think it is quite clear that 'treaty' in this section does not extend to an international treaty such as the *Jay Treaty* but only to treaties with Indians which are mentioned throughout the statute."[61] Since later decisions held that section 88 had no effect on federal laws in any case, this comment gives little or no guidance.

The question of the exact status of treaties has been alluded to in recent decisions. An Ontario court in *Regina* v. *Batisse*, a hunting-rights case, commented in 1978:

> Indians have been hunting and fishing in Northern Ontario from time immemorial. Since the earliest days of colonization their rights to occupy and use their ancient lands have been recognized, and hence all North American Governments have taken steps to reach agreements with the Indians to regulate those rights and control development in Indian lands. When Treaty No. 9 was negotiated, the parties to the Agreement were on grossly unequal footings. Highly skilled negotiators were dealing with an illiterate people, who, though fearful of losing their way of life, placed great faith in the fairness of His Majesty, as represented by federal authorities. As a matter of fact, a careful reading of the Commissioners' Reports makes it fairly obvious that the Indians thought they were dealing with the King's personal representatives and were relying on the word of His Majesty rather than officials of Government. They agreed to give up their interest in their land for a few reserves (carefully chosen by the Government to be far away from any potential source of hydro power) and a few dollars per year per family. As a result, approximately 90,000 square miles of resource-rich land was acquired by the Crown, free of any beneficial Indian interest, for an absurdly low consideration (even for that time). It is still not clear whether Indian treaties are to be considered basically as private contracts or as international agreements. If the former, then the very validity of this treaty might very well be questioned on the basis of undue influence as well as other grounds.[62]

The Court proceeded to uphold the treaty-protected hunting rights against provincial legislation.

The Federal Court, Trial Division, in May 1979 commented: "It is not necessary, for this purpose, to attempt a comprehensive definition of the legal nature of Treaty No. 8. Clearly it is not a concurrent executive act of two or more Sovereign States.

Neither, however, is it simply a contract between those who actually subscribed to it. It does impose and confer continuing obligations and rights on the successors of the Indians who entered into it, provided those successors are themselves Indians, as well as on Her Majesty in right of Canada.[63]

The Federal Court, Trial Division, in July 1979 commented on the character of one of the pre-Confederation treaties in Ontario:

> It is obvious that the Lake-Huron Treaty, like all Indian treaties, was not a treaty in the international law sense. The Ojibways did not then constitute an "independent power", they were subjects of the Queen. Although very special in nature and difficult to precisely define, the Treaty has to be taken as an agreement entered into by the Sovereign and a group of her subjects with the intention to create special legal relations between them. The promises made therein by Robinson on behalf of Her Majesty and the "principal men of the Ojibewa Indians" were undoubtedly designed and intended to have effect in a legal sense and a legal context. The agreement can therefore be said to be tantamount to a contract, and it may be admitted that a breach of the promises contained therein may give rise to an action in the nature of an action for breach of contract.[64]

A second line of cases deals with treaty promises that are in conflict with federal or provincial legislation. This issue has always come up in the context of treaty promises to establish hunting and fishing rights.[65] Although most of the laws relating to hunting come within provincial jurisdiction, a federal power to legislate about Indian hunting activity has been upheld. Federal provisions have been held to insulate treaty-protected hunting rights from provincial game laws.[66] Treaty-protected hunting rights have uniformly been held to be subject to federal legislation, notably the Migratory Birds Convention Act and the Fisheries Act.

In addition there is a series of cases which hold that treaties are to be liberally construed in favour of the Indians.[67] That rule, however, does not bear directly on the character of treaties.

The lack of a clear definition of the status of an Indian treaty in Canadian law is striking. The treaties were not ratified by federal legislation. The Indian Act has only two provisions dealing with treaties: section 72 provides that treaty annuity payments are to be paid out of the Consolidated Revenue Fund; section 88 provides that provincial laws of general application apply to Indians subject to the terms of any treaty.

The most common analysis of the treaties in the case law views them as contracts. But courts have been aware of a problem with this analysis, for how does it explain the fact that the contract exists with a collectivity whose members completely alter over time? Has the tribe a legal entity apart from its individual members? No legislation confers legal status on the tribes. No case law discusses whether tribes are legal entities. The case law is even equivocal on the point of whether bands established under the Indian Act are legal entities. If the treaties are contracts with continuing parties, the tribes must have a legal status arising from the indigenous legal systems. This involves some recognition of the original political separation of the tribes. The analysis of treaties as contracts, then, leads to a view that the treaties are between separate legal and political entities.

The major alternative theory to the view of treaties as contracts would deny treaties any legal significance at all. This analysis suggests that they were politically motivated documents designed to achieve peaceful relations. Governments may have a moral obligation to live up to the treaties, but there is no legal obligation. The case law does not support this view.

A third possibility is to view treaties as a form of subordinate legislation. It has often been asserted that the Royal Proclamation of 1763 has never been repealed and is still in effect. It was the Proclamation that formalized the procedures for treaty making in Canada. The treaties could derive their authority from the Proclamation without the need for subsequent ratification or implementation by Parliament. As long as the treaties came within the scope of the Proclamation, they would be valid as subordinate legislation. Like any other form of legislation, they would be subject to repeal, express or implied, by subsequent legislation. The difficulty with this argument is that the Proclamation describes the treaties solely in terms of land purchases, a narrow framework within which to view treaties. A second problem is that the Royal Proclamation would be the source of authority for the treaties in Ontario and the West, but not for the earlier treaties of peace and friendship in the Maritime provinces.

The white paper of 1969 deliberately played down the significance of the treaties. It noted that only half of the Indians in Canada had made treaties. It described treaty promises as "limited and minimal." Treaty promises of hunting and fishing rights were only "transitional."

> The significance of the treaties in meeting the economic, educational, health and welfare needs of the Indian people has always been limited and will continue to decline. The services that have been provided go far beyond what could have been foreseen by those who signed the treaties.
>
> The Government and the Indian people must reach a common understanding of the future role of the treaties. Some provisions will be found to have been discharged; others will have continuing importance. Many of the provisions and practices of another century may be considered irrelevant in the light of a rapidly changing society, and still others may be ended by mutual agreement. Finally, once Indian lands are securely within Indian control, the anomaly of treaties between groups within society and the government of that society will require that these treaties be reviewed to see how they can be equitably ended.[68]

Prime Minister Trudeau put the same point more strongly: "It's inconceivable, I think, that in a given society one section of the society have a treaty with the other section of the society. We must be all equal under the laws and we must not sign treaties amongst ourselves. . ."[69]

The rejection of treaties was one element in the plan to terminate Indian special status. With the official abandonment of termination, no more has been heard of reviewing and ending the treaties. Instead, over the last few years, the government has contributed funds to allow Indians in Western Canada to hold treaty-centennial celebrations. But when the aboriginal title claims of the Cree and Inuit of James Bay were being settled, the federal government was anxious to avoid 'treaty' terminology. The document is called an 'agreement' and was brought into force by legislation. Cree leaders have recently described it as a 'treaty between nations'.[70]

The Reserve System

Canadian Indian policy focuses around the basic fact of a reserve system. The first reserves were established in New France by Roman Catholic religious orders in 1637.[71] A reserve system was developed in Ontario by the treaties that were signed after the Royal Proclamation of 1763. Reserve systems were formalized in Nova Scotia and New Brunswick in the 1820s and 1830s. On the Prairies reserves were established in compliance with treaty promises in the years after 1871. That process is still incomplete in northern areas. In British Columbia some reserves were established during the colonial period, between 1849 and 1871. After Confederation the reserve system was completed through a long and complex process that involved two joint federal-provincial royal commissions and parallel federal and provincial legislation.

The system that emerged had many anomalies. Reserves were established by grant, purchase, reservation, and designation.[72] Formal title could rest in the Indian band, a religious order, a provincial government, or the federal government. The size of Indian bands varies greatly, from under ten to over ten thousand. In most of the Prairies reserves were established according to the formula of one square mile (approximately 260 hectares) per family of five, but no formula existed for reserves in any other province. In most of Canada a band has only one reserve. On the coast of British Columbia, however, it is not uncommon for a band to have thirty-five reserves. Most of these are small fishing stations on rivers and streams. On the Prairies the government deliberately established reserves away from towns and away from the railway. By contrast, in British Columbia, virtually every major city and town has reserve land within its boundaries or adjacent to it.

The southern reserve system was oriented towards agriculture and made little sense in the North. With only anomalous exceptions, reserves were never established in the Yukon or the Northwest Territories. The Government of Canada had no explanation based on principle for this omission, particularly since the written texts of the treaties in the Northwest Territories promised reserves on the standard Prairie formula.

After Confederation this diverse system of reserves came under federal legislative authority and under one piece of federal legislation, the Indian Act. The mixed history of reserves is reflected in the Act. While reserves are described in section 2(1) as owned by the Crown, section 36 provides that *any* lands that have been set aside for the use and benefit of a band will be treated as a reserve for the purposes of the Indian Act.

Before Confederation government Indian departments were a part of the various Crown-lands offices. After Confederation Indian affairs became a federal matter, while the provincial governments both owned and had jurisdiction over Crown lands. This separation of authority gave rise to some evidently unanticipated problems. The courts ruled that if an Indian band surrendered reserve lands under the terms of the federal Indian Act, both the band and the federal government lost control of the land in favour of the province. This was true in spite of provisions in the Indian Act allowing the federal government to administer surrendered reserve lands on behalf of the band. To clarify this outcome it is necessary to explain two early cases. In the *St. Catherine's Milling* case[73] the Judicial Committee of the Privy Council ruled that an Indian tribe had a "personal and usufructuary" right to its traditional territories. When the tribe signed a treaty surrendering the land, the tribal usufruct ended. In spite of the wording of the treaty, the Indian title was not transferred to the federal government, the other party to the treaty. With the Indian title gone, the lands were Crown lands and, by section 109 of the BNA Act, they belonged to the provincial governments. The treaty worked to the benefit of the province by clearing away the Indian title. This is paradoxical, for the province was not a party to the treaty and paid none of the compensation involved. The functional explanation for the decision is the fact that it established uniform rules for Crown lands. These lands would always be with the provincial government as section 109 had intended, whether the area was covered by a pre-Confederation treaty, a post-Confederation treaty or, perhaps, by no treaty at all. In the *Star Chrome* case[74] the Privy Council ruled that an Indian band had a "personal and usufructuary" right to its reserve lands. On the face of it, the ruling is very odd, for the reserve in question was established under pre-Confederation Quebec legislation that vested title completely in a provincial commissioner. In addition the conclusion was not based on any assertion that the reserve lands were within the traditional territories of the particular Indian tribe. In spite of these basic differences, the Judicial Committee of the Privy Council applied the *St. Catherine's* decision without any serious analysis. The Indian band had a "personal and usufructuary" title to the reserve. When it surrendered part of the reserve, the Indian usufruct ended, and the surrendered lands became provincial Crown lands. The functional explanation for the decision is that it established uniform rules for reserve lands. If a reserve consisted of lands that had never been surrendered, as was the usual pattern in Southern Ontario, then the *St. Catherine's* decision applied to any surrender. By the *Star Chrome* ruling a reserve established in a completely different manner was subject to the same rules. The desire for uniformity is the only rational explanation for the *Star Chrome* decision. Two later decisions have used the same 'personal and usufructuary' terminology to describe the Indian interest in the Six Nations

Reserve in Ontario,[75] though that reserve had its origin in a Crown grant to the Six Nations.

The ruling that an Indian surrender of reserve lands placed those lands beyond the control of both the band and the federal government nullified a part of the federal legislative scheme in the Indian Act. The federal government began negotiating with provincial governments to secure the right to administer surrendered reserve lands on behalf of bands. This transfer of authority has occurred in all provinces with the exception of Quebec and Prince Edward Island. In some provinces, notably British Columbia, the agreements under which the right to administer surrendered lands was transferred to the federal government contain special provisions that have force independently of the provisions of the Indian Act.[76]

The Aboriginal Population

The aboriginal population of what is now Canada is divided into eleven separate language groups and numerous dialects. The status-Indian population is divided into 561 bands who have rights to 2300 reserves. There are Indian bands in all jurisdictions in Canada. In contrast, Inuit communities are found only in the Northwest Territories, Northern Quebec, and Labrador. There are Métis communities in the three Prairie provinces, and in Alberta a small number of Métis 'colonies' established under special provincial legislation.[77]

The Indian Act and the Department of Indian Affairs evolved to administer the Indian reserve communities. There were recurring problems with non-Indian squatters on reserve lands. Early Indian legislation was concerned with defining the population entitled to live on reserves in order to act more effectively against squatters. The membership system that became established in the Indian legislation used a patrilineal descent rule to define the status of members of nuclear family units. Neither the use of patrilineal descent nor the use of nuclear family units accorded exactly with Indian traditions. Indian tribes were often bilateral or matrilineal, not patrilineal. Indians were always members of extended kinship units that included kin outside the nuclear family. Although traditional kinship systems varied from tribe to tribe, the federal Indian Act created a single system of membership, based on kinship, for all Indian tribes in Canada.

The federal government applied the Indian Act membership system to various population groups, defined as bands, whose charter members were normally determined at the time of the establishment of reserves or at the time of treaty negotiations. The patrilineal nature of the system meant that if the father had Indian status, his wife and children had Indian status as well. If the father were non-status, his wife and children lacked Indian status also. A woman without Indian status could gain this status by marrying a status Indian. Alternatively, a status-Indian woman could lose her Indian status by marrying a person without Indian status. In contrast, the United States tended to use a racial criterion, often one-quarter descent, to identify Indians.

The Indian Act membership system involves two notable features. Because it does not involve a generic, conceptual, or racial definition of 'Indian', it selected some Indians for recognition and refused to recognize others. This selectivity has never been challenged and, by ordinary constitutional rules, could not be challenged. The federal government is not constitutionally obliged to legislate to the full extent of its powers, or to legislate uniformly, for everyone or everything that falls within federal powers. The selective character of the Indian Act membership system has created a category of 'non-status Indians'. They are people of Indian descent who are not recognized as Indians for the purposes of the Indian Act.

A second notable feature of the Indian Act membership system is that it discriminates on the basis of sex. Successive Ministers of Indian Affairs have stated their intention to end the sexual discrimination in the Act.

The origin of the Métis population is different from the origin of the non-status-Indian population, although the two terms are used interchangeably on the Prairies.[78] The Métis population developed in the West during the fur-trade period, roughly from 1670 to 1870. By 1870 the population of Red River in Southern Manitoba consisted of 5720 French-speaking 'Half-Breeds', 4080 English-speaking 'Half-Breeds', and 1600 white settlers. The Métis, or 'Half-Breed', population had a distinct identity and resisted the incorporation of the Northwest into Canada without some recognition of their political demands and property rights. This resistance, the Red River Rebellion of 1869–70, led to the negotiated entry of the Northwest into Confederation and to special provisions for 'Half-Breed' land rights. The Manitoba Act of 1870 provided for 1 400 000 acres (approximately 566 600 hectares) of land to be granted to the descendants of 'Half-Breed' heads of families. This provision for 'Half-Breed' grants was extended to the balance of the Prairie provinces and the present Northwest Territories by the Dominion Lands Act. The system of 'Half-Breed' grants ran parallel to the system of treaties and reserves for Indians. In spite of the terminology used, the division of the indigenous population into 'Indians' and 'Half-Breeds' was not exclusively racial. At times the government promoted the conversion of individuals from Indian status to 'Half-Breed' status in order to free Indian reserve lands.

If there is a legal definition of 'Métis', it means the people who took 'Half-Breed' grants under the Manitoba Act or the Dominion Lands Act, and their descendants. Section 12(1)(a)(i) of the Indian Act excludes those people from registration as Indians.

The question whether the Inuit people fell within the constitutional meaning of the term 'Indian' in section 91(24) of the BNA Act was referred to the Supreme Court of Canada by the federal government in 1939.[79] On historical grounds the Supreme Court ruled that the drafters of the Constitution would have considered the Inuit as a tribe of Indians. On that basis they were held to come within federal legislative jurisdiction over Indians. Section 4 of the Indian Act, however, specifically excludes Inuit. There are some provisions in federal statutes and regulations referring to Inuit, mainly in relation to hunting and fishing rights. The only equivalent for Inuit of the Indian Act or the reserve system is in the provisions of the James Bay and Northern Quebec Agreements that settled aboriginal title claims in Northern Quebec.

The question whether Métis or non-status Indians come within the constitutional definition of the term 'Indian' has not been decisively resolved. The loss of Indian Act status by marriage or by the voluntary process called 'enfranchisement' would not logically have the effect of taking the person concerned outside the constitutional category of 'Indian'. Current discussions about revisions to the membership system that would allow the reinstatement to membership of women who lost status by marriage indicate the view of the federal government that the constitutional category cannot be limited by the legislative category created in the Indian Act.

The arguments in relation to Métis might be thought different, but the difference does not bear scrutiny. It can be argued that the Métis were originally a mixed-blood population that had evolved a separate identity in the West before Confederation. Yet the Manitoba Act, which was passed by the provisional government in Red River and by the Canadian Parliament and was confirmed as part of the Constitution by the Imperial Parliament, states that the 'Half-Breed' grants were made toward the extinguishment of the 'Indian Title' to the lands of Manitoba. Moreover the practice after 1870 indicated that the government did not see a firm and clear division between the two populations. A federally appointed commissioner reporting in 1944 commented: "In negotiating the various Indian treaties from time to time the aboriginal inhabitants of mixed blood were given the right to elect whether to take treaty or scrip. . . When Treaty No. 8, with which we are more directly concerned in this inquiry, was concluded in 1899, a large proportion of those admitted into treaty at that time were of mixed blood."[80] The term used in the Manitoba Act and the Dominion Lands Act was 'Half-Breed'. Clearly, mixed-blood peoples were not excluded from Indian status when membership lists were first prepared and could not now be excluded from Indian status without purging the Indian-reserve communities of at least half their population. The exclusion of 'Half-Breeds' or Métis from the constitutional category of 'Indians' would seem contrary to the Manitoba Act, contrary to early practice, and disruptive of well established patterns of Indian policy.

The question of the constitutional position of Métis and non-status Indians has been raised in the courts in Saskatchewan. The three Prairie provinces are covered by the terms of the Natural Resources Transfer Agreements, which are part of the Constitution by the British North America Act of 1930. The Agreements define certain hunting rights for "Indians." The question has arisen whether Métis and non-status Indians are entitled to these constitutionally protected hunting rights. In *R. v. Pritchard*,[81] a judge of the magistrate's court in Saskatchewan ruled that a non-status Indian, being an Indian by "race and ancestry," came within the constitutional category and had rights to hunt under the Natural Resources Transfer Agreements. The case was appealed to the Saskatchewan District Court, where it was mistakenly ruled that *Pritchard* came within the Indian Act definition of 'Indian'.[82] In the *Laprise* case in 1978,[83] the Saskatchewan Court of Appeal noted that at the time of the Natural Resources Transfer Agreements, the Indian Act defined 'Indians' as "persons entitled to be registered as such."

The court limited the definition for the purposes of the Natural Resources Transfer Agreements to people who were, in fact, registered as Indians. This meant giving a different meaning to the term 'Indian' in the Natural Resources Transfer Agreements from that given to the term in section 91(24) of the BNA Act of 1867.

It is logical for the courts, in defining the term 'Indian' for constitutional purposes, to allow it to encompass virtually all descendants of the aboriginal population. What legislative categories are to be used for the purposes of government programs is a separate question, and the task of deciding this question can be seen as appropriate to Parliament, not the courts. The existence of 'Indian' hunting rights on the Prairies under the Natural Resources Transfer Agreements should not be taken to require the courts to develop a limited definition of the term 'Indian'. The rights are limited to rights to hunt for food and are subject to being overridden by federal legislation if limitations for purposes of conservation prove necessary.

The Application of Provincial Laws

Section 91(24) of the BNA Act of 1867 meant federal jurisdiction over two subjects, Indians and Indian lands. Some cases did not distinguish clearly between the two heads and either limited the federal jurisdiction to Indians on Indian lands or envisaged a more than cumulative effect when the two subjects came together. In 1979 the Supreme Court of Canada criticized those views and confirmed that the two subjects must be treated separately.[84]

The federal status of Indians and Indian lands is unique in Canadian law. Aliens, as well, were placed under special federal jurisdiction, but no special legal régime exists for them. Federally incorporated companies were another group of federal 'persons', and some of the Indian cases use terminology developed in relation to them. In total the cases on aliens and federal companies indicated that provincial laws generally applied to federal persons. The cases on the immunities of interprovincial railways from provincial laws dealt with a land-based system and, for that reason, had direct analogies to questions about Indian reserves; but those cases have been of very limited help. Only one line of non-Indian cases has paralleled an Indian issue sufficiently closely to virtually dictate the outcome. Decisions permitting provincial taxation of non-governmental occupiers of federally owned lands have been applied to allow provincial taxation of non-Indian occupiers of Indian-reserve lands.

The cases over the last two decades seem to establish the following propositions about federal jurisdiction:

- Provincial laws apply to Indians, as long as they do not discriminate against them, unless they are in conflict with federal Indian legislation.
- Provincial laws apply to Indian-reserve lands if they do not directly affect the use of land, do not discriminate against those lands, and are not in conflict with federal Indian legislation.

In 1870 an Ontario court ruled that an Indian could be elected in a local election off a reserve if the Indian otherwise met the qualifications of provincial law. Indians were held to be subjects, not aliens.[85] In 1878 Quebec courts upheld the federal exemptions from seizure under provincial laws of Indian property located on a reserve.[86] An Ontario court recognized in 1884 that a local law about animals running at large would not apply on Indian-reserve lands.[87] An Ontario court in 1889 held that the province could not grant timber rights on reserve lands.[88] Federal legislation about Indian wills was upheld in Ontario in 1895.[89]

In 1907 the Ontario Court of Appeal ruled that the Ontario Medical Act, creating an offence for the unlicensed practice of medicine, applied to an Indian.[90] The case is unsatisfactory in two ways. There is no indication whether the Indian was practising traditional medicine or Western medicine. Apparently the offence took place off the reserve, though that factor is not commented on in the judgment. The case has been frequently cited since and is one of the foundations for the general principle that provincial laws apply to Indians unless they conflict with federal Indian legislation.

In 1915 a British Columbia court held that provincial hunting laws did not apply to an Indian on a reserve.[91] In 1917 an Ontario court convicted an Indian under the Ontario Temperance Act.[92] The decision has been subsequently cited for the general proposition that provincial laws apply to Indians. It is not a good example of the principle, for the legislative field was occupied, for Indians, by the Indian Act.

An Ontario court declared in 1918 that an Indian, being a ward of the federal government, could not be imprisoned under provincial laws.[93] This decision was followed in New Brunswick in 1930[94] and in Nova Scotia in 1939.[95] The proposition was rejected in 1956 by an Ontario County Court[96] that relied on a new section introduced into the Indian Act in 1951. This doctrine was the only judicially constructed exemption of Indians from provincial laws that did not have an explicit federal legislative base.

The inapplicability of provincial game laws to Indians on reserves, upheld in British Columbia in 1915, was applied to Indian trappers by the Manitoba Court of Appeal in 1923.[97] Did this mean that provincial hunting laws did not apply on reserves? In peculiar companion cases in British Columbia in 1930 and 1931, an Indian agent and his hunting companion, a lawyer, were convicted under provincial laws for hunting on an Indian reserve.[98] This confused the questions of jurisdiction over Indians and jurisdiction over reserve lands, and the authority of the decisions is doubtful.

In 1941 the British Columbia Court of Appeal allowed the province to tax non-Indian occupiers of reserve lands on the basis of the assessed value of the lands and improvements, though the tax could not be realized against the Indian lands.[99] The decision was based on previous case law on the tax status of federal Crown lands and has been followed in subsequent decisions.[100]

In 1955 the Quebec Superior Court ruled that Indian employees should be included in any bargaining unit under provincial labour-relations law.[101]

In the 1960s a major series of Indian hunting- and fishing-rights cases began. They upheld Indian hunting rights against provincial laws in two situations. Indian hunting rights guaranteed in the Prairie provinces by the Natural Resources Transfer Agreements and the British North America Act of 1930 were upheld against provincial laws.[102] Secondly treaty-protected hunting rights were upheld against provincial laws with the aid of section 88 of the Indian Act.[103] Provincial hunting laws applied to Indians off reserves in all other situations.[104] The result was that the courts upheld federal legislative power over Indians hunting off reserves, but ruled that Indians had no exemption from provincial hunting laws unless federal legislation gave the exemption.

A series of cases began in the 1970s on the application of provincial laws on reserves. In 1970 the British Columbia Court of Appeal ruled that provincial health and zoning laws did not apply to a development on leased reserve lands, for such laws would affect the use of land.[105] Other decisions have applied provincial laws on maintenance,[106] minimum wages,[107] partition,[108] rent control,[109] automobile insurance,[110] and builders' liens.[111] Provincial laws have been held not to apply on reserves when they deal with hunting,[112] the physical requirements for a mobile home park,[113] fire permits,[114] the division of marital property,[115] or a tax on the purchase of property by an Indian.[116]

Two cases on the application of provincial laws on Indian reserves have gone to the Supreme Court of Canada. The *Cardinal* case of 1973 decided a very narrow point.[117] Provincial laws relating to game (in this instance, the sale of wild meat) that did not affect the right of Indians to hunt and fish for food, applied to Indians as a result of the provisions of the Natural Resources Transfer Agreements. The significance of the case lies, not in the decision, but in the language used by the majority and minority judgments. The majority, while conceding that certain provincial laws would not apply on reserves, rejected the notion that reserves were 'enclaves' beyond the reach of provincial law. The minority, while conceding that certain provincial laws would apply on reserves, asserted that reserves *were* 'enclaves'. The decision of the Supreme Court of Canada in the *Four B* case in 1979 is much clearer.[118] The Court applied provincial labour-relations laws to an Indian-owned business with a majority of Indian employees located on reserve lands. The Supreme Court found nothing inherently 'Indian' about the operation and noted that there was no federal legislation asserting jurisdiction over the labour relations in question.

Only one case on the application of provincial laws to Indians has gone to the Supreme Court of Canada. The question raised in *Natural Parents* v. *Superintendent of Child Welfare* was whether provincial adoption laws could apply to a status-Indian child.[119] Four judges ruled that the provincial law affected Indians as Indians and therefore could only apply to them if the provincial law had been adopted by federal legislation and made to apply to Indians. They ruled that section 88 of the Indian Act had so adopted the provincial adoption law. Three other judges held that the Indian Act, by referring to adoption, implicitly intended provincial adoption laws to apply to Indians. Two judges ruled that a provincial adoption law did not affect

Indians as Indians and that, at least in the absence of federal legislation on the question, such a law would apply to Indians. This four-to-three-to-two ruling produced no majority reasoning on the question.[120]

There have been various opinions in the cases on the meaning of section 88 of the Indian Act. The section reads: "Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the Province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act." The section by its terms refers only to the application of provincial laws to 'Indians'. It does not purport to deal with the application of provincial laws on Indian reserves. Opinion has been divided on whether section 88 is simply a restatement of existing constitutional rules, or whether the section has the effect of making certain provincial laws apply to Indians that would otherwise not apply to them. In the *Natural Parents* case the Supreme Court of Canada divided equally on this question, with one judge making no comment on the issue. The question would be readily resolved by regarding the whole legislative field in relation to 'Indians' as a double-aspect area. All provincial laws that do not discriminate against Indians would apply to Indians unless they were in conflict with federal legislation. In this analysis section 88 is not important in defining what provincial laws apply to Indians, but in defining what provincial laws do *not* apply to Indians. In stating that provincial laws do not apply where there are federal legislative provisions or any regulation or by-law enacted under the authority of the Indian Act, the section is simply stating the normal constitutional rules about the occupation of the field in a double-aspect area. In only one way does section 88 extend the federal occupation of the field: that is, by its reference to treaties. The operative part of section 88 is its provision that provincial laws of general application do not apply to Indians when they are in conflict with the provisions of a treaty. This is an unusual kind of occupation of the field, but there is no reason why it should not be enforced by the courts.

This review of the degree to which Indians and Indian lands are exempt from provincial laws shows an imperfectly defined system. The reality is not quite as confusing if it is remembered that the Indian Act is, in general, not concerned with Indians, but with reserves. Federal legislation deals only with reserve lands and reserve communities. Federal legislation does not govern Indians who are living off the reserves. Some provincial laws do not apply on reserves because the field is occupied by the Indian Act. Other provincial laws do not apply on reserves because they deal directly with the use of land. This has left a host of other provincial laws, such as those dealing with workers' compensation, labour relations, and employment standards, apparently applying. Gradually the cases are holding that these provincial laws do apply. There has been added confusion about whether the rules that apply to reserve lands that have been surrendered and leased are different from rules that apply to unsurrendered lands. It now seems settled that there is no difference. While these rules will gradually become clearer, there seems little doubt that a revised Indian Act could substantially expand the range of provincial laws that do not apply to reserve lands, whether unsurrendered or surrendered or leased. But amendment of the Indian Act on these questions seems unlikely in the short run. The gradual process of judicial definition will have to continue under the present legislative patterns.

Indian Self-Government

Indian legislation, at least since Confederation, has provided for a measure of Indian self-government at the reserve level. This is accepted without question as coming within federal legislative authority, although the Constitution refers only to jurisdiction over Indians and Indian lands. Indian-reserve governments are a distinct order of government in Canada in that they are municipal-level governments within the provinces, which are established by federal legislation. As the collective land holders, as well as a unit of local government, they differ from other local-government units.

The future of Indian self-government must be seen in the context of two competing concepts of the function of reserves. The reserves were originally established as alternatives to the direct incorporation of the Indian people into the colonial population. They were designed to settle the Indians, to educate and christianize them, and to establish agriculture as their primary economic base. The reserves were part of a long-term plan of assimilation. They were to be a temporary system of separate development. The reality was much different. Once Indians were pacified and isolated, Euro-Canadian interest in the reserve communities largely ended. The Indians were progressively marginalized, and this prevented their assimilation. The reserves, which were to have been a vehicle for integration, ensured the distinct survival of Indian communities.

The competing view of reserves is the Indian view. While the tribal populations came to understand that they were facing fundamental changes in their way of life, they had no intention of abandoning the political and social structures they knew. The reserves were areas where their societies could continue and develop. Initially the reserves were not confining. Extensive hunting and gathering activity could take place on traditional lands outside the reserves. As Euro-Canadian settlement increased in the fertile areas of Canada, the economic base for the communities became increasingly restricted to the reserve, both by the loss of hunting lands and by the exclusion of Indians from the economic and political life around them. Paradoxically, while the reserves had become a trap, they were still vital to Indian survival.

The Indian Act recognized the existence of traditional Indian forms of self-government. By the Act these forms would, at a suitable stage in the development of each particular band, be replaced by an elected band council. The band-council system could be seen either as an example of colonial indirect rule or as local democratic self-government. In practice the Department of Indian Affairs used the system as one of indirect rule with the result that chiefs and councils were more an extension of government than the representatives of their people. At times the Department ousted chiefs whom it disliked and replaced them with its own preferred candidates. The local Indian agent held the real power in the community. Until after the Second World War, the pattern survived of band-council meetings being called by the Indian agent, who prepared the agenda and presided over the meeting.[121] But today some bands have moved to virtually complete self-management of their reserve lands and have assumed the administration of many of the programs of the Department of Indian Affairs. Band legislative powers, set out in sections 81 and 83 of the Indian Act, are modest and in the past have been the focus of little attention. In 1979 and 1980 some bands experimented with their by-law powers, and four cases have arisen that test band powers.[122]

Indian organizations in Canada today stress the idea of Indian government as a distinct order of government within Canada. Indian governments already exist at the reserve level, and the idea is to strengthen those governments greatly by increasing the Indian resource base and the band's legislative powers. In response the Department of Indian Affairs has proposed a 'charter' system of Indian government to be established under new Indian legislation. Bands would be able to prepare their own charter or constitution, defining the institutions of Indian self-government. The proposal is modelled on the Indian Reorganization Act, passed in the United States in 1934, but the Canadian proposal is more modest than is the American model.

Nationalism

Euro-Canadian society envisaged the assimilation of the indigenous population into the new nation-state created by colonialism. While the reserve system established a separation of populations, the theory underlying that system was one of separate development leading to eventual assimilation. The Indian Act created a special status that was juridically inferior to that of non-Indians. As Indians developed as individuals, they were to cast off that inferior status by the process of 'enfranchisement'.

The indigenous leadership did not accept the same view of their future within Canada. The Iroquois expressed their ideas in the 'two-row wampum' belt that symbolically depicted Indian and white society permanently co-existing in North America. The most constant goal of the Indian leadership has been distinct group survival. The reserve system, justified by Euro-Canadians as a method of controlled culture change, became for Indians a bastion of group survival.

Indian leaders worked to achieve equal rights in the period immediately after the Second World War, a period in which officially sanctioned discrimination against status Indians was still common. But gradually the patterns of current Indian political organization began to take shape. In the late 1960s the federal government organized a two-year consultation with Indians about reform of the Indian Act. The final Indian answer was a refusal to deal with the Indian Act because of the priority assigned to dealing with the questions of treaty and aboriginal rights. The consultation process was followed by a government white paper in 1969 that proposed the repeal of the Indian Act and the termination of the Department of Indian Affairs. The white paper generally dismissed claims based on treaty or aboriginal rights. Indians strongly opposed the white paper, and their opposition led to a government retreat a year later. In the period that immediately followed, Indian political activity focused on land claims, primarily in non-treaty areas of the country. Major aboriginal title cases from British Columbia, Quebec, and the Northwest Territories were heard in the courts in 1973. Because of the prominence of lawyers as advisers to the Indian organization, and because of the use of the courts, aboriginal title claims were narrowly framed as property claims. For the aboriginal leadership this was too restrictive a framework, and as the 1970s progressed, aboriginal claims focused less on legal, and more on political, aspects. The new position can be described as 'nationalist'. It drew some strength from the United States, but it was primarily based in long-held views of Canadian Indians. We are only now beginning to understand the continuity that lies behind the current Indian political positions.

The document that perhaps marked most clearly the move to nationalism was the Dene Declaration of 1975.[123] It began:

> We the Dene of the Northwest Territories insist on the right to be regarded by ourselves and the world as a nation.
>
> Our struggle is for the recognition of the Dene Nation by the Government and peoples of Canada and the peoples and governments of the world.

The Declaration then described the end of colonialism in Africa and Asia, but not in the Americas:

> The Dene find themselves as part of a country. That country is Canada. But the Government of Canada is not the government of the Dene. The Government of the Northwest Territories is not the government of the Dene. These governments were not the choice of the Dene, they were imposed on the Dene . . .
>
> What we seek then is independence and self-determination within the country of Canada. This is what we mean when we call for a just land settlement for the Dene Nation.

The government reaction was negative. Indian Affairs Minister Judd Buchanan referred to the Dene Declaration as 'gobbledegook'. The federal politicians rejected aboriginal nationalism at a time when they were facing a strong nationalist movement in Quebec. In 1978 Indian Affairs Minister Hugh

Faulkner reacted to Dene positions by claiming that the Dene "wanted more than Lévesque."

In 1976 the Inuit Tapirisat of Canada, the national Inuit organization, released a proposal for the establishment of an Inuit territory in the Northwest Territories, to be called 'Nunavut'. A 1979 paper, "Political Development in Nunavut," detailed how the territory would develop into a province in twelve to fifteen years. Because of the isolation and harsh climate of the Inuit lands, the Inuit thought that they could guarantee Inuit control of the jurisdiction if they had a ten-year residency requirement for voting.

The federal government responded to both Dene and Inuit nationalism with a rejection of racially defined jurisdictions, other than Indian reserves, and the appointment of the Drury inquiry into political evolution in the Northwest Territories. During the life of the Drury Commission, the federal government refused to discuss political or jurisdictional questions as part of land-claims negotiations in the Northwest Territories. The aboriginal organizations, other than the Committee for Original Peoples Entitlement (C.O.P.E.), in the Mackenzie Delta, were unwilling to separate the issues, and no progress was made towards a settlement of the Inuit or Dene claims. The Drury Commission reported in 1980,[124] bringing in recommendations that have been rejected both by the Territorial government and the aboriginal groups.

The Native Council of Canada (N.C.C.) represents Métis and non-status-Indian populations. In a brief circulated to First Ministers in October 1978, the N.C.C. identified their people as 'an historic national minority':

> We are an historical national minority with rights inherent in that status which go beyond the right to equality of opportunity. The latter right assumes that we be assimilated into either French or English versions of Canadian society. As an historical national minority we have the right to remain separate and distinct from both versions and develop along lines dictated by our own cultural aspirations. The question for us therefore, is not the vague, charitable one of gaining access to "equality of opportunity" in "the Canadian mosaic," but more correctly, how to relate to Canadian society without losing our identity, lands and those rights inherent in our aboriginal status in the process . . .
>
> No other minority in Canada can say that it has a greater right to self-determination than we. We decided not to exercise this right in full when we brought Manitoba into Confederation in 1870. We believed in Confederation then and actively resisted annexation of

> the West to the United States. We thought Confederation would allow us to develop and prosper as a distinct people, as a partner in Confederation.[125]

The Declaration of Rights of the Native Council of Canada, presented to the federal government in 1979, asserts: "... Metis nationalism is Canadian nationalism. We embody the true spirit of Canada and are the source of Canadian identity.

"That we have the right to self-determination and shall continue — in the tradition of Louis Riel — to express this right as equal partners in Confederation . . ."[126]

The nationalist positions of the three national aboriginal organizations led each to seek equal status with the provinces and the federal government in constitutional negotiations. While the three organizations were invited to make submissions and to be participants in the discussions on matters directly affecting them, Mr. Chrétien, the federal Minister of Justice, cautioned their leaders in August 1980 that, in his assessment, the idea of indigenous governments as a kind of third order of government within Canada was a 'non-starter' in any discussions with First Ministers. He had, of course, said the same thing about aboriginal title claims eleven years earlier.

While the government has rejected the idea of aboriginal sovereignty, it has accepted a notion of aboriginal self-government. Prime Minister Trudeau has identified one of the issues to be discussed with Native organizations as 'internal native self-government'. This is acceptable terminology for the federal government at the moment. 'Self-determination within Canada' seems to be unacceptable terminology.

Aboriginal issues have been both hindered and helped by French Canadian nationalism. The concern with Quebec clearly lay behind the Liberal government's response to the issue of Indian special status in 1969 and has expressly influenced its response to aboriginal nationalism in the period since 1975. The Parti québécois government of Premier Lévesque, in power in Quebec since 1976, has been concerned with asserting its tolerance for minority rights within the province. In part this has been a response to accusations from opponents of Quebec nationalism, like Prime Minister Trudeau, that any form of nationalism will inevitably be intolerant and parochial. But, to a large extent, the Parti québécois's concern seems a genuine recognition that the arguments for Quebec's cultural and political independence logically apply to other groups as well. The policy paper on Quebec culture included a special section on Native peoples. It began by rejecting the notion that the aboriginal peoples were simply another minority. The paper concluded that, on the basis of their historical roots, the aboriginal peoples had a claim to the territory of Quebec that constituted a challenge to the thinking of the francophone majority, stating: "However, as it moves forward in the definition of its collective design, the Francophone majority is perceiving ever more clearly that such a project can be significant only if it truly succeeds in taking the specific character of the native minorities into account."[127]

The report goes on to state three principles to guide the Quebec government in its aboriginal policy:

> First, the government is aware that it must avoid any attempt to decide unilaterally the future of the native peoples. It is primarily the responsibility of these communities to determine their own development. This of course implies open discussion by the native people on their social and cultural status.
>
> This principle naturally entails another, positive in this case. The native peoples of Québec must not be left to their own resources on the pretext of respecting their autonomy, because that would mean allowing certain adverse economic and cultural forces to influence their destiny, unimpeded. As citizens of Québec, the native peoples must be able to count on the support of the State of Québec.
>
> How can these two principles be reconciled? How can the right of the natives to determine their own development and their need for government aid be reconciled?
>
> This reconciliation depends on a third principle. Since they can survive and prosper only on the basis of their deeply rooted characteristics, the native cultures are responsible for devising the institutions and strategies which will suit their own development. The government intends to apply itself to encouraging this return to their sources and even to providing financial aid for such initiative.[128]

In spite of the indications of goodwill on the part of the Parti québécois government, aboriginal leaders in Quebec have been opposed to separation and anxious to maintain a tie to the federal government.

Future Directions

Our traditional Indian policy has been one of structural pluralism. Separate structures are maintained by the state for the status-Indian sector of the population. The extent of structural pluralism has dramatically decreased in the period since the Second World War. Separate systems for education, voting, liquor, and social services have gone. The 1969 white paper proposals were an attempt to push those developments through to their logical extreme by removing much of the structural support for the present reserve system. Canadian Indians, in one of their first national political fights, were able to 'derail' the proposals. In the decade following that victory, Indians, Métis, and Inuit have been developing their own ideas for structural pluralism. The aboriginal enclave populations have sought to maximize local aboriginal control of cultural, social, political, and economic activity. The more dispersed Métis population has sought special representation in federal and provincial political institutions. When the aboriginal groups argue cultural difference, the legitimacy of the argument is widely accepted in Canada. In contrast, the response to arguments for structural pluralism for social programs has been more ambiguous. Most significantly we have as yet been unable to come to terms with the political and economic aspects of aboriginal questions.

There has been an evolution of stated policy goals promoted by governments during the 1970s. The first issue on which a shift in state policy became clear concerned aboriginal land claims. One reason for aboriginal groups to assert land claims in the early 1970s was to oppose termination and to argue for a larger system of special rights. This meant that any government acceptance of aboriginal title claims could not be tied to a strategy of termination as it had been in the United States twenty years earlier.

Aboriginal title claims were an inadequate basis for a complete reform of Canadian aboriginal policy since these claims existed only in non-treaty areas, that is, in only half the country. The federal government revised even that view and will not accept aboriginal title claims from non-treaty areas in Southern Canada.[129] Land claims are, then, a frontier phenomenon. We have a settlement for Northern Quebec and can expect settlements in the Northwest Territories and the Yukon as well. It is, however, painfully obvious that we have not been able to progress satisfactorily with land-claims settlements beyond the highly politicized context that existed in Quebec in the first half of the 1970s. The government seems to perform badly. It lacks both skilful negotiators and an internal structure that can accept the power sharing inherent in negotiated change. Aboriginal groups also seem to perform badly. They often lack the self-confidence and internal cohesion that make negotiation and compromise possible. We do not yet see light at the end of this particular tunnel, but neither side has given up. The recent federal Cabinet decision, based primarily on aboriginal claims, to delay the Norman Wells pipeline for two years, is significant. While a priority was given to aboriginal claims, the fairly short time limit involved carries its own message.

Land-claims settlements will play a limited part in the evolution of aboriginal policy in Canada unless they occur outside the North, which at present seems unlikely. Some expansion of reserve assets may occur in Southern Canada,[130] but the general framework of reform will not consist of land-claims settlements. It is only the theme of aboriginal nationalism or Indian self-government that can bridge the dual polarities of 'treaty' and 'non-treaty', 'frontier' and 'southern'. The federal government is being drawn further into accepting Indian-initiated self-government terminology. But even if the federal government and the Indian leadership were to agree on a formula such as 'Indian self-determination within Canada', what would be the actual nature of the change implied? The Department of Indian Affairs faces two realities. It will not receive substantially increased budgets in the immediate future. Secondly, for political reasons, a substantial revision of the Indian Act is unlikely. If those problems were to be overcome, there is a yet more basic problem. The indigenous enclave populations in Canada are small. The Navajo Reservation in the United States has a population of over a quarter of a million people. The successful Cuna Reserve in Panama provides a home for a substantial population in a geographically isolated area. What degree of local autonomy is possible for Indian communities in Canada? What effect will local autonomy have on their already marginal economic position? Are we destined to repeat the patterns of the United States and Panama, where some indigenous groups are able to exercise a substantial degree of self-government while others continue to suffer extreme marginality?

The claim by aboriginal groups of the right to maintain their own culture is widely accepted in Canada today. We tend to forget how new this attitude is. It reflects broader currents of change. In the last decade the federal government has officially accepted a policy of multiculturalism. International concern with human rights displays a renewed interest in minorities. The most positive image of Indian and Inuit communities is that of cultural minorities. The most positive image of an individual Indian or Inuit is that of an artist.

Since few Indians or Inuit are, in fact, artists, the strength of the cultural argument lies, not so much in its own logic, but in its support for community control of schools and social services. In the early 1970s the National Indian Brotherhood developed a position paper on education entitled "Indian Control of Indian Education." The federal government officially adopted the policy, but implementation has been uneven. Indian reserve communities may be able to assume limited control of their education system if they take the initiative to press for such a change, and if they have the local population and degree of organization to sustain a school. The responsibility for developing a curriculum reflecting Indian history and cultural values appears to lie completely with the local community. The most predictable results of such a policy are the development of a small number of 'show-piece' schools, but little or no change for the great majority of Indian students.

A major obstacle to local aboriginal control of schools and social services is the established pattern of federal-provincial co-operation. For three decades now capital investment in schools has supported the integration of Indian students into provincial schools. Federal-provincial financial arrangements have placed on provincial governments the primary responsibility for social services for Indian communities. Local communities seeking to take control in these areas find they must deal with both levels of government. They also have to justify local patterns of control against an established tradition of uniform policies in each province.

Most reserve communities are too small to carve out very much local autonomy in education and social services. This could lead to Indian bands forming regional organizations to handle these aspects of self-government. A few such bodies have developed in the country and show real promise. It seems clear that they will develop unevenly, though some legislative framework for their existence could be helpful.

A second barrier to local political and administrative strength is financial. Most aboriginal communities are very poor. During the sixties and seventies various 'soft money' programs have made funds available to bands, but no governmental body can exist on such ephemeral sources of revenue. Bands and regional administrative bodies need stable funding, just as municipal governments need stable funding.

The basic issue, then, is economic. The aboriginal communities represent population groups whose traditional economies have been destroyed in all but frontier areas. After the initial dislocation, attempts to establish a new agricultural economy on the reserves were undercut by a combination of continued land loss and deliberate marginalization. The earlier romantic notions that Indians were culturally unable to convert to agriculture were racist nonsense. Our long-term strategy of isolating aboriginal communities seemed functional as long as we believed that Indians were a dying race, and as long as they stayed out of the cities and towns. That strategy broke down with the Second World War and the social and economic changes that followed, but even in the post-war period the government had mixed views of Indian economic development. If structural pluralism were to be phased out, economic development of reserve communities would be counter-productive. The white paper tried to combine termination with economic development by offering to make "substantial additional funds available for investment in the economic progress of the Indian people." With the abandonment of the white paper, the federal government initiated an economic development loan fund as a separate program. It worked badly. We did not learn from our mistakes and set about refashioning the program. With the general economic problems of the late 1970s, we seem to have largely abandoned economic development as a major strategy in aboriginal policy. This failure makes a mockery of much that passes for aboriginal policy in Canada today.

The potential for aboriginal self-government in Canada is limited. But that truth cannot be used as a justification for the various ways we have penalized reserve-level governments by an uncertain legal framework, unstable funding, and an inadequate resolution of federal-provincial jurisdictional boundaries. The Department of Indian Affairs has not been successful in fields such as band training or economic development. Provincial governments have been able to block or inhibit reserve developments in various parts of the country, though they generally accept no positive responsibility for reserve communities. We must not let the *status quo* stand as an argument against aboriginal self-government. That is to stack the deck and load the dice. A reasonable measure of success at the local level will inevitably reduce the symbolic polarization at higher levels.

Can we look forward to a stable situation in which aboriginal communities have a reasonable degree of local autonomy, and Canadian society feels comfortable with the structural pluralism involved? Divided jurisdictions are more complex than single jurisdictions. But we have chosen federalism over a unitary state for the same kinds of reasons that would underlie a decision to continue structural pluralism in relation to Indian communities. We have shown little skill during our history in dealing with minorities, but it can be argued that that is changing. The story of section 35 is a classic account of how *not* to handle minority issues: we wound up buying some new inter-group bitterness. The greatest barrier is economic. Until the economic levels of aboriginal groups are brought within a normal Canadian range, we cannot expect either meaningful local autonomy or a politically stable aboriginal policy.

Notes

1. Statement of the Government of Canada on Indian Policy, 1969, Department of Indian Affairs and Northern Development. The policy stated on page 6, "The government believes that the framework within which individual Indians and bands could achieve full participation requires: that the legislative and constitutional bases of discrimination be removed . . ."

2. Canada, Parliament, Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Final Report* (Ottawa: Queen's Printer, 1972), p. 16.

3. *Province of Canada Idea for Natives, Suggested Manual* (Yellowknife, N.W.T.: The Native Press, 28 June 1976), p. 5; Nahanee, "Repatriation of the BNA Act — A Loss or Gain for Natives?" *The Native Perspective* (magazine), June-July 1976, p. 20.

4. *Saskatchewan Indian* (magazine), October 1976, p. 18.

5. The Royal Proclamation has been seen as a major source of Native rights in Canada: see *St. Catherine's Milling and Lumber Co.* v. *The Queen*, (1889) 14 A.C. 46; *R.* v. *Wesley*, (1932) 4 D.L.R. 774 (Alta. S.C. App. Div.). Its technical significance may have been ended by the decision in *Calder* v. *Attorney General of British Columbia*, [1973] S.C.R. 313, but it remains important as establishing the foundation for the treaties, as recognizing Indian title to land, and for its description of the Indian tribes as nations.

6. Canada, Privy Council, *A Time for Action: Toward the Renewal of the Canadian Federation* (Ottawa: Minister of Supply and Services Canada, 1978), p. 8. The quotation is the second stated principle in a chapter entitled "The Principles of Renewal."

7. Canadian Bar Association, Committee on the Constitution, *Towards a New Canada* (Toronto, 1978), p. 11.

8. Task Force on Canadian Unity, *A Future Together* (Ottawa: Minister of Supply and Services Canada, 1979), pp. 58–59.

9. Notes for remarks by the Prime Minister at a national conference of Indian chiefs and elders, Ottawa, 29 April 1980, p. 12.

10. See Douglas Sanders, "Indians, the Queen and the Canadian Constitution," *Survival International Review* 5, No. 2 (1980), p. 6.

11. Letter of Noel Starblanket to Prime Minister Clark, 2 October 1979. Reply of the Prime Minister, 11 October 1979.

12. Québec, Conseil exécutif, *Québec-Canada: A New Deal. The Québec Government Proposal for a New Partnership Between Equals: Sovereignty-Association* (Quebec: Éditeur officiel, 1979), p. 56.

13. *Rencontre*, April 1980. *Rencontre* is a magazine published by the Government of Quebec and aimed at the aboriginal population in that province.

14. Constitutional Committee of the Quebec Liberal Party, *A New Canadian Federation* (Montreal, 1980), p. 84. The Beige Paper.

15. Letter of Prime Minister Trudeau to Mr. Noel Starblanket, 11 August 1980.

16. Canada, Parliament, Continuing Committee of Ministers on the Constitution, *Proposed Charter of Rights* (Ottawa, 1980), s. 36(2).

17. *Ibid.*, s. 55(c).

18. Daniels, *Native People and the Constitution of Canada — The Report of the Métis and Non-Status Indian Constitutional Review Commission* (Ottawa: Mutual Press, April 1981).

19. "PM's Proposed Charter Centre of Controversy," *The Native People* (newspaper), Edmonton, 12 June 1981, p. 1.

20. Mr. Broadbent stated on the CBC radio program "As It Happens" on Friday, 6 November 1981 that he understood from two people who were present at the meeting that the Prime Minister had supported the removal of section 34. Ian Anderson reported: "Trudeau tried briefly to reinstate native rights in the charter, but extracted only a promise to reconsider them as soon as possible." See Ian Anderson, "Cement for a Nation," *MacLean's Magazine*, 16 November 1981, p. 32. Richard Gwyn reported: "During these same 10 hours or so during which the constitutional deal was done, the so-called 'aboriginal rights' of native peoples took up, at most, 10 minutes of everybody's time. Among themselves the premiers scarcely mentioned the topic. Trudeau, when the compromise deal was brought to him, asked if aboriginal rights had been omitted by mistake. The premiers mumbled, no. Trudeau shrugged and moved on to the next agenda item." See Richard Gwyn, "The Premiers' Shame," *Vancouver Sun*, Friday, 13 November 1981.

21. Francis Jennings, *The Invasion of America: Indians, Colonialism, and the Cant of Conquest* (Chapel Hill, N.C.: University of North Carolina Press, 1975) is a good example of modern scholarly rethinking of the history of colonialism in North America.

22. Province of Canada, Legislative Assembly, Sessional Paper, 1847, 11 Victoria, Appendix T, Section 3, Pg. 1 General Recommendations, *Report on the Affairs of the Indians in Canada*.

23. The humanitarian movement in nineteenth-century England was actively concerned with aboriginal populations. The 1837 Great Britain Select Committee Report . . . with respect to the Native Inhabitants of Countries where British Settlements are made . . . Sessional Papers, 1837 (425) VII. 1, already referred to, gave official recognition to the plight of aboriginal people in the Empire and advocated their protection and supervision by a centralized authority. The Supreme Court of the United States in the 1820s spoke of government protection in the language of trusteeship and wardship and upheld full centralized jurisdiction.

There are no records of discussions on the decision in favour of central authority in Canada in 1867. Provincial jurisdiction would have been logical for two reasons. By 1867 significantly different legal patterns had developed in the colonies that federated, including differences between Quebec and Ontario that continued during their period of union in the Province of Canada. Secondly the provinces were given jurisdiction over land, education, and social welfare matters, all relevant to Indian questions. It is unlikely that centralized authority was chosen because the federal role in Western colonial expansion was anticipated. Section 146 of the BNA Act provided for the admission of "Rupert's Land and the North-Western Territory into the Union on such terms and conditions as Canada might request and the Queen approve." The assumption appears to have been that the West might enter Canada as a territory or territories and therefore come under the complete control of the central government. It seems unlikely, as well, that the close nexus between Indian policy and military policy would have prompted federal jurisdiction. Indian affairs had been removed from military authority in 1830 in Upper Canada, and relations with the tribes in the uniting colonies appear to have been peaceful in the period leading up to Confederation. If conflict were to occur in the West, the area would be under federal jurisdiction, and in any case military jurisdiction would lie with the federal government. A third possible reason for central authority lies in the established pattern of Indian treaties. Were these treaties seen as a use of prerogative powers that would lie only with the federal government? There seems to have been no discussion of this question in the period. Another suggestion is that Indian affairs was costly because of the presents and annuities connected with the treaties. Since the federal government had better sources of revenue than the provinces, it was better able to bear the costs of policy relating to Native people. Finally, it is possible that the decision in favour of centralized authority was influenced by the constitutional pattern already established in the United States.

24. See Douglas Sanders, "Métis Rights in the Prairie Provinces and the Northwest Territories: A Legal Interpretation," in H.W. Daniels, ed., *The Forgotten People* (Ottawa: Native Council of Canada, 1979), pp. 5–22.

25. The reference to 'the Company' is to the Hudson's Bay Company. The provision was referred to by Mr. Justice Morrow in *Re Paulette*, (1973) 6 W.W.R. 97 (N.W.T.S.C.) (reversed on other grounds on appeal).

26. The 'policy as liberal' language is unique in Canadian constitutional provisions. An attempt to invoke it was rejected by the Supreme Court of Canada in *Jack* v. *The Queen*, [1980] 1 S.C.R. 294.

27. Parallel statutes for each extension were enacted by the provincial and federal governments in 1912. Evidence of Canadian government practice on the recognition of Indian rights and the obtaining of surrenders was heard by the Quebec Superior Court in the *Kanatewat* case for the purpose of giving content to the provisions of the 1912 legislation: *Kanatewat* v. *James Bay Development Corp.* (1973) 41 D.L.R. (3d) 1 (Quebec S.C.)

28. The hunting- and fishing-rights provisions have been upheld against provincial laws, but not against federal laws: see Douglas Sanders, "Indian Hunting and Fishing Rights," *Saskatchewan Law Review* 38 (1973–74), p. 54.

29. There is a federal-provincial agreement between the Government of Canada and the Government of Newfoundland and Labrador, under which federal grants are made for Indian and Inuit communities in that province.

30. Task Force on Canadian Unity, *A Future Together*, p. 56.

31. Canada, MacKenzie Valley Pipeline Inquiry, *Report of the MacKenzie Valley Pipeline Inquiry*, Vol. 1, *Northern Frontier, Northern Homeland* (Ottawa: Minister of Supply and Services Canada, 1977), p. 174.

32. Canada, Department of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy* (Ottawa, 1969). See S.M. Weaver, *Making Canadian Indian Policy, the Hidden Agenda* (Toronto: University of Toronto Press, 1981).

33. *Regina* v. *Drybones*, [1970] S.C.R. 282.

34. *Attorney General of Canada* v. *Lavell*, [1974] S.C.R. 1349.

35. *Attorney General of Canada* v. *Canard*, [1976] S.C.R. 170. Subsequent cases invoking the Canadian Bill of Rights have not challenged provisions in the Indian Act.

36. Decision on Communication submitted by Sandra Lovelace, 30 July 1981 (CCPR/C/DR(XIII)/R. 6/24).

37. *Calder* v. *Attorney General of British Columbia*, [1973] S.C.R. 313 at 328.

38. Canada, Archives, *Documents Relating to the Constitutional History of Canada, 1819–1828*, selected and edited by Arthur G. Doughty and Norah Story (Ottawa: Queen's Printer, 1935), pp. 175–78.

39. *Lazare* v. *St. Lawrence Seaway Authority*, (1957) Que. S.C. 5.

40. *Logan* v. *Styres*, (1960) 20 D.L.R. (2d) 416 (Ont. H.C.)

41. See Douglas Sanders, "Family Law and Native People," Law Reform Commission of Canada, 1975, unpublished. Douglas Sanders, "Indian Women: A Brief History of Their Roles and Rights," *McGill Law Journal* 21 (1975): 656–72.

42. *Re Deborah*, (1972) 5 W.W.R. 203 (N.W.T.C.A.)

43. *R.* v. *Machekequonabe*, (1898) 28 O.R. 309.

44. In *St. Catherine's Milling and Lumber Company* v. *The Queen*, (1889) 14 A.C. 46 at 54, the Judicial Committee of the Privy Council stated that Indian territorial rights existing prior to Treaty 3 in Northwestern Ontario could "only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown." Judson J., in *Calder* v. *Attorney General of British Columbia*, [1973] S.C.R. 313 at 322, after quoting the passage from the *St. Catherine's* case, stated, "I do not take these reasons to mean that the Proclamation was the exclusive source of Indian title."

45. *Kruger and Manuel* v. *R.*, [1978] 1 S.C.R. 104.

46. That is, relating to the right of temporary possession, use, or enjoyment of the advantages of property belong to another, so far as may be had without causing damage or prejudice to it.

47. *St. Catherine's Milling and Lumber Company* v. *The Queen*, (1889) 14 A.C. 46.

48. *Calder* v. *Attorney General of British Columbia*, [1973] S.C.R. 313. See K. Lysyk, "The Indian Title Question in Canada: An Appraisal in the Light of Calder," *Canadian Bar Review* 51 (1973): 450–80; D. Sanders, "The Nishga Case," *The Advocate* (Vancouver Bar Association) 36 (1978), p. 121.

49. See *Kruger and Manuel* v. *R.*, [1978] 1 S.C.R. 104.

50. *Kanatewat* v. *James Bay Development Corp.*, (1973) 41 D.L.R. (3d) 1 (Quebec S.C.), reversed on appeal by the Quebec Court of Appeal, 22 November 1973, unreported.

51. *Hamlet of Baker Lake* v. *Minister of Indian Affairs and Northern Development*, (1978) 87 D.L.R. (3d) 342 (F.C.T.D.); D.W. Elliott, "Hamlet of Baker Lake and the Concept of Aboriginal Title," *Osgoode Hall Law Journal* 18 (1981): 653–63; J.E. Bickenback, "The Baker Lake Case: A Partial Recognition of Inuit Aboriginal Title," *University of Toronto Faculty of Law Review* 38 (1980): 232–49.

52. Reprinted in Douglas Sanders, *Cases and Materials on Native Law*, 3rd ed. (Saskatchewan: University of Saskatchewan, College of Law, 1976), p. 82.

53. See Appendix III in Peter A. Cumming and Neil H. Mickenberg, eds., *Native Rights in Canada*, 2d ed. (Toronto: General Publishing, 1972),

54. See *Indian Treaties and Surrenders from 1680 to 1890* (Ottawa: Queen's Printer, 1891 & 1912), reprinted in Coles Canadiana Collection, 1971; Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the Northwest Territories* (Toronto: Belfords, 1880), reprinted in Coles Canadiana Collection, 1971. The post-Confederation treaties are reprinted in a series of pamphlets by the Department of Indian Affairs.

55. See René Fumoleau, *As Long as This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870–1939* (Toronto: McClelland and Stewart, 1975); Richard Price, ed., *The Spirit of the Alberta Indian Treaties* (Montreal: The Institute for Research on Public Policy, 1979).

56. *Attorney-General for the Dominion of Canada* v. *Attorney-General for Ontario*, (1897) A.C. 199.

57. *Ibid.*, p. 211.

58. *Ibid.*, p. 213.

59. (1905) 2 Ex. C.R. 417.

60. Angers, J. unreported, 10 April 1935 (Ex).

61. [1956] S.C.R. 618.

62. (1978) 19 O.R. (2d) 145 (D.C. Temiskaming).

63. *Town of Hay River* v. *The Queen*, (1980) 101 D.L.R. (3d) at 186 (F.C.T.D.)

64. *Powis* v. *The Queen*, (1980) 102 D.L.R. 602 at 607 (F.C.T.D.)

65. *Sikyea* v. *The Queen*, [1964] S.C.R. 642; *R.* v. *George*, [1966] S.C.R. 267.

66. *R.* v. *White and Bob*, (1966) 52 D.L.R. (2d) 481 (S.C.C.) Logically the same immunity could be conferred by federal legislation on Indian hunting rights in non-treaty areas. To date it has not been. See *Kruger and Manuel* v. *The Queen*, [1978] 1 S.C.R. 104. The Supreme Court of Canada refrained from mentioning section 88 in the *Kruger and Manuel* decision. The section would, therefore, appear to be unnecessary in making provincial hunting laws apply to Indians. Where, however, it specifies an exception (as it does when there are treaty-protected hunting rights), it is effective to prevent provincial laws from applying.

67. See, for example, *R.* v. *Batisse*, (1978) 19 O.R. (2d) 145 (D.C. Temiskaming).

68. *Statement of the Government of Canada on Indian Policy*, p. 11.

69. Quoted in Cumming and Mickenberg, *Native Rights in Canada*, p. 331.

70. C.B.C. radio news report of the conference on Indigenous People and their lands, held by the Organization on Non-Governmental Organizations in Geneva, September 1981.

71. Cornelius J. Jaenen, *Friend and Foe* (Toronto: McClelland and Stewart, 1976), pp. 177–81.

72. No general history of the establishment of reserves exists. On occasion lands were granted to a Native group or to a religious order on behalf of a Native group. Lands have been purchased by Indians and by the federal government and have achieved reserve status. Most of the reserves in Southern Ontario were reserved by the Indians out of surrenders of traditional lands. When the lands in question were Crown lands, they could be established as reserves by the reservation or designation of the lands by the Crown.

73. (1889) 14 A.C. 46.

74. (1921) 1 A.C. 401.

75. *Brick Cartage* v. *The Queen*, (1956) 1 Ex C.R. 102; *Davey* v. *Isaac*, (1974) 5 O.R. (2d) 610 (Ont. C.A.), affirmed on appeal to the Supreme Court of Canada without reference to this point: [1977] 2 S.C.R. 897.

76. Most of the documents are reprinted in Sanders, *Cases and Materials on Native Law*, pp. 171–235.

77. Metis Betterment Act, R.S.A. 1970, c. 233.

78. See generally George F.C. Stanley, *Birth of Western Canada: A History of the Riel Rebellions* (Toronto: University of Toronto Press, 1936). Douglas Sanders, "Metis Rights in the Prairie Provinces and the Northwest Territories . . ."

79. *Reference re Eskimos*, [1939] S.C.R. 104.

80. "Report of the Honourable W.A. MacDonald on the exclusion of Half-breeds from treaty lists, August 7, 1944" reprinted in Cumming and Mickenberg, *Native Rights in Canada*, p. 325.

81. Policha, J. unreported, 1 October 1971 (Sask. Mag. Ct.)

82. (1973) 32 D.L.R. (3d) 617 (Sask. D.C., Battleford).

83. *R.* v. *Laprise*, (1978) 6 W.W.R. 85 (Sask. C.A.). A third case, *R.* v. *Budd*, *R.* v. *Crane*, (1979) 6 W.W.R. 450 (Sask C.A.) has followed the *Laprise* decision.

84. *Four B Manufacturing Ltd.* v. *United Garment Workers of America*, (1980) 102 D.L.R. (3d) 385 (S.C.C.)

85. *R. ex rel Gibb* v. *White*, (1870) 5 P.R. 315.

86. *Durand* v. *Sioui*, (1878) 4 Q.L.R. 93; *Lepage* v. *Watzo*, (1878) 8 R.L. 596; *Hannis* v. *Turcotte*, (1878) 8 R.L. 708.

87. *Re Milloy and the Municipal Council of the Township of Onondaga*, (1884) O.R. 573.

88. *Attorney General of Ontario* v. *Francis*, *The Empire Newspaper*, Toronto, 21 January 1889.

89. *Johnson* v. *Jones*, (1895) 26 O.R. 109.

90. *R.* v. *Hill*, (1908) 15 O.L.R. 406.

91. *R.* v. *Jim*, (1915) 26 C.C.C. 236.

92. *R.* v. *Martin*, (1918) 39 D.L.R. 635 (Ont. S.C. App. Div.)

93. *Re Caledonia Milling Co.* v. *Johns*, (1918) 42 O.L.R. 338.

94. *Ex. p. Tenasse*, (1931) 1 D.L.R. 806 (N.B.S.C.)

95. *Re Kane*, (1940) 1 D.L.R. 390 (N.S. Co. Ct.)

96. *Campbell* v. *Sandy*, (1956) 4 D.L.R. (2d) 754 (Haldimand Co. Ct. Ont.)

97. *R.* v. *Rodgers*, (1923) 3 D.L.R. 414 (Man. C.A.)

98. *R.* v. *McLeod*, (1930) 2 W.W.R. (B.C.C.C. Yale); *R.* v. *Morley*, (1932) 4 D.L.R. 483 (B.C.C.A.)

99. *City of Vancouver* v. *Chow Chee*, (1942) 1 W.W.R. 72 (B.C.C.A.)

100. *Provincial Municipal Assessor* v. *Rural Municipality of Harrison*, (1971) 3 W.W.R. 735 (Man Q.B.); *Sammartino* v. *Attorney-General of British Columbia*, (1972) 1 W.W.R. 24 (B.C.C.A.)

101. *John Murdock* v. *La Commission des Relations Ouvrières*, (1956) Que. S.C. 30.

102. *R.* v. *Prince*, (1962) 40 W.W.R. 234 (Man. C.A.), per Freedman at 242–43, which judgement was affirmed on appeal: [1964] S.C.R. 81.

103. *R.* v. *White and Bob*, (1966) 52 D.L.R. (2d) 481 (S.C.C.)

104. *Kruger and Manuel* v. *The Queen*, [1978] 1 S.C.R. 104.

105. *Corporation of Surrey* v. *Peace Arch Enterprises Ltd.*, (1970) 74 W.W.R. 380, (B.C.C.A.)

106. *Black Plume* v. *Black Plume*, (1972) 4 R.F.L. 149.

107. *R.* v. *Baert Construction*, (1974) 19 C.C.C. (2d) 304.

108. *Re Bell and Bell*, (1977) 16 O.R. (2d) 197 (S.C.)

109. *Re Park Mobile Home Sales Ltd.* v. *LeGreely*, (1978) 85 D.L.R. (3d) 618 (B.C.C.A.)

110. *R.* v. *Twoyoungmen*, (1980) 101 D.L.R. (3d) 598 (Alta. C.A.)

111. *Western Industrial Contractors Ltd.* v. *Sarcee Developments Ltd.*, (1980) 98 D.L.R. (3d) 424 (Alta. S.C. App. Div.)

112. *R.* v. *Isaac*, (1976) 13 N.S.R. (2d) 460.

113. *Millbrook Indian Band* v. *Northern Counties Tenancies Board*, (1978) 84 D.L.R. (3d) 174 (N.S.S.C.)

114. *R.* v. *Sinclair*, (1978) 6 W.W.R. 37.

115. *Sandy* v. *Sandy*, (1980) O.R. (2d) 192.

116. *Brown* v. *R. in right of British Columbia*, (1980) 20 B.C.L.R. 64 (C.A.)

117. *Cardinal* v. *Attorney General of Alberta*, [1974] S.C.R. 695.

118. *Four B Manufacturing Ltd.* v. *United Garment Workers of America*, (1980) 102 D.L.R. (3d) 385 (S.C.C.)

119. *Natural Parents* v. *Superintendent of Child Welfare*, (1976) 60 D.L.R. (3d) 148 (S.C.C.)

120. See D. Sanders, "Comment," *Osgoode Hall Law Journal* 13 (1976): 489–98.

121. *Guerin* v. *The Queen*, unreported, 3 July 1981. J. Collier (F.C.T.D.)

122. To date the only reported decision is *R.* v. *Sacobie*, (1980) 30 N.B.R. (2d) 70.

123. The Dene Declaration is reprinted in Mel Watkins, ed., *Dene Nation — The Colony Within* (Toronto: University of Toronto Press, 1977), pp. 3–4.

124. Canada, Privy Council, *Constitutional Development in the Northwest Territories, Report of the Special Representative* (Ottawa: Minister of Supply and Services Canada, 1980).

125. "Towards Co-equality: Integration vs. Assimilation," in Harry W. Daniels, *We Are the New Nation: The Metis and National Native Policy* (Ottawa: Native Council of Canada, 1979), pp. 47–48.

126. *Ibid.*, p. 54.

127. Québec, Ministre d'état au développement culturel, *A Cultural Development Policy for Québec*, Vol. 1, *A General Review: The Culture Under Consideration* (Quebec: Éditeur officiel, 1978), pp. 61–62.

128. *Ibid.*, pp. 62–63.

129. The policy statement of August 1973 referred to claims where the traditional use of the land by Indian and Inuit groups "was never extinguished by Treaty or superseded by law." The federal government now apparently is of the view that the granting of title to land to third parties has the effect of superseding the Indian claim, in spite of the fact that the statement speaks of claims for the 'loss' of traditional rights to land.

130. The treaty promises of reserves were never completely fulfilled in the Prairie provinces. There have been some controversies about the exact amount of land that was to be set aside, and the Government of Saskatchewan has agreed to fairly significant allocations of land to reserves in the province. Implementation has proved difficult and undoubtedly will not be completed for a few years.

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Human Rights and Constitutional Options for Canada

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Human Rights and Constitutional Options for Canada

Introduction

Apart from the amending formula, the most important item agreed on in the constitutional accord achieved on 5 November 1981 is a new Canadian Charter of Rights and Freedoms. While a discussion of the effects that different constitutional options might have on human rights and fundamental freedoms might now seem both hypothetical and burdensome, nevertheless such a discussion can serve a useful purpose for two reasons. The first is that Quebec's participation in this new constitutional arrangement is still in some question. The second is to show that, regardless of which constitutional option may be adopted, there would be no great difference in the manner of providing for human rights protections. For this purpose a prerequisite is a review of the laws and institutions currently in operation.

The Current Means of Protecting and Promoting Human Rights and Fundamental Freedoms

Although the British North America (BNA) Act does not include a bill of rights, it does contain certain provisions that could not be omitted from Canada's future constitutional human rights provisions. Thus section 93 protects certain collective religious rights to the establishment of separate schools, even though it does not apply to all religious groups nor, to the same extent, to all provinces; section 133 protects Canadians' rights to the use of the English and French languages in judicial and legislative institutions at the federal level and in Quebec; and section 23 of the Manitoba Act makes the same provisions for Manitoba, although these provisions, too, do not apply equally to all Canadians since they touch only Quebec and Manitoba.[1] Furthermore section 20 requires an annual session of the Parliament of Canada, while section 50 requires elections of members of the House of Commons of Canada at least once every five years. Section 99, too, provides that judges of the Superior Courts hold office "during good behaviour" until the age of 75 because it is the Canadian equivalent of the British Act of Settlement of 1701, which was intended to ensure the independence of the judiciary. Apart from these provisions, however, there appears to be nothing to restrict either the provincial Legislatures or the Parliament of Canada from abrogating, infringing, or abridging civil liberties as long as the pertinent legislative or administrative acts are within the jurisdiction of the government concerned, as set out in the BNA Act.[2]

As long as Canada retains a federal form of government, however, its Constitution will continue to be protected by its federalism, the most important aspect of our Constitution and the one that distinguishes it from that of the United Kingdom. Federalism protects human rights and fundamental freedoms in at least three different ways. In the first place, it protects minority or group rights. The French language is protected in Canada, not so much by the Constitution, as by the existence of the Province of Quebec, where a French-speaking majority dominates. Moreover the very necessity of dealing with the government and people of a French-speaking province enforces at least a certain minimum of bilingualism on the federal Parliament and the federal public service. Secondly, since in a federal state every person is at the same time a citizen of a province and of the country as a whole, and since legislative jurisdiction relating to the various human rights and fundamental freedoms is divided between the two orders of government, neither order alone can totally determine the limits on rights and liberties. Thirdly it is not easy for any one government, even when acting within its jurisdiction, to be more restrictive of civil liberties than another, because there is the ever present possibility of comparing the status of civil liberties within one province with that in another. Moreover, with eleven governments and First Ministers, even if the same political party were dominant in each province, which has probably never occurred, the rivalry between these heads of government provides a certain check on the oppressiveness or arbitrariness of any one government.

In considering the laws and institutions designed to protect and promote human rights and fundamental freedoms, which have been adopted in Canada since the Second World War, one would have to start with the Saskatchewan Bill of Rights Act of 1947. This Act included the fundamental freedoms of religion, expression, assembly, and association, made brief reference to the legal civil liberty of freedom from arbitrary arrest or detention, prohibited discrimination in access to employment, accommodation, and education, and proclaimed the right of everyone to exercise the franchise and "to require that no Legislative Assembly shall continue for a period in excess of five years" (s. 7). In 1979, following certain intermediate legislative measures establishing fair accommodation and fair employment-practices standards, equal pay provisions, and a commission to administer all this human rights legislation, the Legislative Assembly adopted the Saskatchewan Human Rights Code. The code served to consolidate all the human rights legislation into one statute, and this statute was brought up to date by adding or amending provisions that have been found necessary in North America for the more effective overcoming of discrimination and disadvantage based on membership in certain groups.

The next Canadian instrument specifically designed to protect civil liberties was the Canadian Bill of Rights enacted in 1960. Section 1 of the bill dealt with the fundamental freedoms, as well as with the "due process of law" and "equality before the law" clauses. Unlike the comparable freedoms treated in the Saskatchewan Bill of Rights Act, the fundamental freedoms were set out in stark simplicity without elaboration, and the same was true with the "due process" and "equality before the law" clauses. Section 2 of the Canadian Bill of Rights, on the other hand, went far beyond section 7 of the Saskatchewan Bill of Rights in setting out in fairly detailed form many of the legal civil liberties that would be expected in a modern bill of rights; possible exceptions were a requirement of trial without undue delay and injunctions against unreasonable searches and seizures, retroactive punishment, and double jeopardy. In 1972 the Legislature of Alberta enacted the Alberta Bill of Rights. This was essentially a copy of section 1 of the Canadian Bill of Rights, but the former conspicuously left out section 2 of the latter. Thus the Alberta Bill of Rights did not include any of the specific provisions for the protection of legal civil liberties other than the rather vague "due process" clause.

In 1975 the Quebec National Assembly enacted the Charter of Human Rights and Freedoms to be administered by *La commission des droits de la personne*. This is the most comprehensive human rights charter in the country. Not only does it include the fundamental freedoms, as do the bills of rights of Canada, Alberta, and Saskatchewan, and the rights to non-discrimination that are covered by human rights codes or acts in all of the provinces and at the federal level, but it also embraces the legal civil liberties — the Charter terms them 'judicial rights' — that are even more extensive than those set out in section 2 of the Canadian Bill of Rights. Thus the essence of article 10 of the International Covenant on Civil and Political Rights is provided through sections 25, 26, and 27. Section 25 requires that persons arrested or detained "must be treated with humanity and with the respect due to the human person." Section 26 requires that everyone confined to a house of detention "has the right to separate treatment appropriate to his sex, his age and his physical or mental condition." Section 27 provides that a person confined while awaiting trial "has the right to be kept apart, until final judgment, from prisoners serving sentence." Moreover the Quebec charter has two provisions that represent major lacunae in the Canadian Bill of Rights: section 30 requires a person arrested or detained to be brought "promptly before the competent tribunal," while section 37 contains an injunction against retroactive punishment. Finally, unlike any other bill of rights anywhere, section 29 provides for the right of a person arrested or detained "to immediately advise his next of kin thereof."

Moreover, unlike any other human rights act in Canada, the Quebec charter, in Chapter IV, even proclaims "Economic and Social Rights." A few of these provisions might be noted.

- Section 39 gives every child a right "to the protection, security, and attention that must be provided to him by his family or the persons acting in their stead."
- Section 40 provides the right "to the extent and according to the standards provided for by law" to "free public education."

- Section 45 speaks of a right of every person and his family "to measures of financial assistance and to social measures provided for by law" to ensure "an acceptable standard of living."
- Section 48 provides that "every aged person and every infirm, mentally defective or mentally ill person has a right to protection against any form of exploitation."
- Section 44 includes "a right to information to the extent provided by law."
- Section 43 makes the unique provision that "persons belonging to ethnic minorities have a right to maintain and develop their own cultural interests with the other members of their group."

Furthermore Chapter I includes a number of provisions (ss. 4, 5, 6, 7, and 8) stating the right to protection of privacy, and section 2 even provides that "every human being whose life is in peril has a right to assistance." Chapter II proclaims two "Political Rights": the right to petition the National Assembly for the redress of grievances (s. 21) and the right of everyone "legally capable and qualified . . . to be a candidate and to vote at an election." Finally, it should be noted that section 52 of the charter provides that the non-discrimination clauses in Chapter I (ss. 10 to 20), the "Political Rights" in Chapter II, and the "Judicial Rights" in Chapter III "prevail over any provision of any subsequent act which may be inconsistent therewith unless such act expressly states that it applies despite the Charter."

To complete this picture of the institutional protections, it must be added that in addition to the four bills or charters of rights mentioned above, every one of the eleven jurisdictions in Canada has a Human Rights Commission administering a comprehensive Human Rights (Anti-Discrimination) Act, and that all provinces, other than Prince Edward Island, have established the institution called the 'ombudsman', a commissioner responsible to the Legislature, with jurisdiction to investigate complaints against decisions taken in abuse of discretionary powers, or maladministration or other forms of official misconduct. There is no equivalent at the federal level to jurisdiction over the bulk of the public service, although there are certain special ombudsmen such as the Correctional Investigator, the Privacy Commissioner, and the Official Languages Commissioner.

Some Provisos, Obvious or Otherwise, to Consider in Contemplating Canadian Legal and Constitutional Change Involving Human Rights

There will always be divided legislative jurisdiction with respect to human rights and fundamental freedoms in Canada whether Quebec separates (and either does, or does not, enter into an economic association with the Canada that remains) or whether, assuming that Quebec is to remain a part of Canada, one or more provinces might be granted distinctive status *de jure* or eventually develop such status *de facto* within a Canadian federal state. Therefore, as far as any specific laws or institutions relating to protection of human rights are concerned, action will be required by more than one government.

When one considers two of the important institutions established in Canada during the past twenty years for the promotion and protection of human rights, that is, human rights commissions and the ombudsmen, it becomes obvious that each has a role confined within one jurisdiction. In other words, regardless of the future constitutional structure of the territories now making up Canada, each jurisdiction will continue to have its own human rights commission administering anti-discrimination legislation. Since most of the jurisdiction with respect to access to employment and accommodation is within the provincial sphere, provincial commissions will always have a role. It is impossible, however, to envisage any form of central government that would not have within its jurisdiction some kinds of employment, as well as certain services, facilities, and accommodation, to which the public is customarily admitted. Similarly, since the function of an ombudsman is to aid in the redress of grievances arising from maladministration or unfair exercise of discretion, the institution of ombudsman will have to be separate for each separate jurisdiction.

As far as bills of rights are concerned, on the other hand, it is possible to have either separate bills of rights for each jurisdiction or one for the country as a whole or even one for two or more countries as, for example, the European Convention on Human Rights or the newly adopted Inter-American Convention on Human Rights. Obviously, in going from our present constitutional position to whatever position we may reach in the future, the adoption of a bill of rights that would apply to the provinces (and clearly to any territory that might become independent and sovereign) *by convention* can only be achieved with the consent of the province (or territory) concerned or of some majority in a continuing federal state. Plainly such a bill of rights concerns "matters coming within the class of subjects . . . assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges . . . granted or secured to the Legislature or the Government of a province" (s. 91[1] of the BNA Act). Conventionally Parliament alone could not amend "the Constitution of Canada," except with respect to itself, even though it has the legal power to do so.[3] Thus, since there is a convention to the effect that an amendment of the Constitution by the Parliament of the United Kingdom concerning matters within the exception of Head 1 of section 91 cannot be sought by the Parliament of Canada, except with substantial provincial consent, then, surely, that convention must govern (at least until we have a domestic amending formula) any amendment to the BNA Act to include a bill of rights binding, not only on the federal sphere, but on the provinces as well.[4]

Nevertheless, when the Constitutional Resolution, including the proposed Canadian Charter of Rights and Freedoms, leads to its enactment by the United Kingdom's Parliament, then both the provincial Legislatures and the Parliament of Canada will be subject to the same basic constitutional instrument. However, there is no reason why those parts of the Quebec charter described earlier that are not overtaken by the new Canadian charter should not continue to operate, just as would the "property" clause of section 1 of the Canadian Bill of Rights.

Human Rights Provisions in Proposals for Constitutional Change

On 5 November 1981 the First Ministers' Constitutional Conference agreed to a federal resolution requesting the United Kingdom's Parliament to enact a final amendment to the BNA Act providing for 'patriation' with, among other inclusions, an amending formula and a Canadian Charter of Rights and Freedoms. Since then the question concerning the status of a charter of rights in future constitutional arrangements has not been, "A charter of rights — yes or no?" but rather, "The Charter of Rights and Freedoms — is it good enough?" The object of this article is to try to respond to that latter question by considering whether the constitutional options proposed for this over-all study would have affected the choices made about the three main issues concerning any bill or charter of rights: (a) the issue of overriding effect; (b) definition and scope; (c) enforcement and remedies.

The Issue of Overriding Effect

Unless a bill of rights is a sham or is merely intended as a statement of guiding principles to be followed, the basic test of its effectiveness is whether the judiciary can apply it in order to override legislative or administrative action found to be inconsistent. Apart from the necessity of having a majority of judges on the highest court with courage enough to take up the challenge, the two most important factors to determine whether a bill of rights will have such overriding effect are its constitutional status and the intent expressed concerning its application.

Constitutional status

During the past two decades much has been written about the desirability of entrenching a bill of rights, and even whether it is at all possible to do so in the face of the constitutional principle known as 'parliamentary supremacy'. It would be pointless to repeat the various arguments because it now seems well enough accepted that a constitution can provide for entrenchment of all or part of its provisions.[5] It seems strange that Canadian lawyers took so long to accept that fact because there was never a time when all parts of our Constitution could be amended by a simple legislative process of either legislative order, and no one can seriously argue that that would ever be the case in the future, with or without 'patriation' and with or without distinctive status for one or more of the provinces.

Nevertheless, it is not so much whether a bill of rights can be amended or repealed that is important; it is, rather, whether the courts will give it overriding effect. Except in a revolutionary situation or a state of war, when the whole constitution, including a bill of rights, may be suspended, no country that has adopted a written bill of rights has done away with that bill of rights in time of peace when the constitution as a whole is respected and applied. Canada has never seen any proposal by any political party at the federal level to do away with the present Bill of Rights or to amend it, except in an attempt to improve it. The same is true with respect to the provincial bills of rights of Saskatchewan, Alberta, and Quebec and the anti-discrimination (human rights) codes of all jurisdictions.

Nevertheless, including a bill of rights in the basic constitutional document and providing for its entrenchment in that document could be, and probably is, important for another reason: that reason is that this may be the quickest means to convince a reluctant judiciary that the legislators were serious when they attempted to adopt a bill of rights that would have overriding effect. Thus, since the newly agreed-on charter would constitute Part I of the Constitution Act, 1982, its status as a constitutional and entrenched bill of rights can no longer be denigrated by a timid judiciary.

Intent

The intent expressed in the application section is the other important factor in determining whether a bill of rights will be effective in overriding inconsistent legislative or administrative action. The Canadian Bill of Rights has been criticized on the basis that its operative provision, section 2, merely proclaims that, in the absence of its *non obstante* clause, "every law of Canada shall . . . be so construed and applied as not to abrogate, abridge or infringe . . . any of the rights or freedoms herein recognized and declared." Prior to 1970 there was some question whether this indicated any suppressive intent.[6] However, despite this ambiguity, the majority of the Supreme Court in the *Drybones* case[7] did hold that section 2 could be given no sensible interpretation other than the intention of a suppressive effect over inconsistent legislation. The three dissenting judges all indicated that they might have agreed with the majority if the legislative intent had been more clearly expressed.

It is interesting to note on this point that both of the comprehensive provincial bills of rights, that is, the Quebec charter and the Saskatchewan Human Rights Code, include more explicit overriding clauses than does section 2 of the Canadian Bill of Rights. Thus section 52 of the Quebec charter provides: "Sections 9 to 38[8] prevail over any provision of any subsequent act which may be inconsistent therewith unless such act expressly states that it applies despite the Charter." Section 44 of the Saskatchewan code is even more clearly expressed: "Every law of Saskatchewan is inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act unless it falls within an exemption provided by this Act or unless it is expressly declared by an Act of the Legislature to operate notwithstanding this Act." With a similar intent, and perhaps even more implicitly, section 52 of the Constitution Act, 1982, which includes the Canadian Charter of Rights and Freedoms as its Part I, provides:

> 52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

In summary, to entrench a bill of rights in the sense that its amendment is made more difficult or complicated than the usual legislative process, is not as important as whether the bill is clearly designated and accepted as part of the Constitution, and whether its operative provision expresses clearly enough the intent that the bill is to have overriding effect.

In addition to the issue of overriding effect, however, as the cases following *Drybones* have indicated, there are two other important issues that can drastically affect the efficacy of a bill of rights even if the judiciary is prepared to accept its 'primacy'. These are the way in which the courts define the scope of the rights and freedoms proclaimed, and whether remedies are available and applied.

Definition and scope

The scope of a bill of rights is determined by the definitions given by the courts to the rights and freedoms declared. This, in turn, is largely determined by three factors: the time frame; the rights and freedoms included; the accepted limitations.

The time frame. Probably no other factor has contributed as much to the lack of application of the present Canadian Bill of Rights as the determination by majorities on the Supreme Court that the bill did not create any new rights or freedoms, but was only intended to protect those in existence at the time it was enacted. I have called this the 'frozen concepts' principle of interpretation.[9]

This interpretation started from the *Robertson and Rosetanni* case,[10] where Mr. Justice Ritchie declared that "the Canadian Bill of Rights is not concerned with 'human rights and fundamental freedoms' in any abstract sense, but rather with such 'rights and freedoms' as they existed in Canada immediately before the statute was enacted."[11] This approach was carried forward by Mr. Justice Martland in *Regina* v. *Burnshine*,[12] where he, like Ritchie J. in the *Robertson and Rosetanni* case, made reference to the words "have existed and shall continue to exist" in section 1 of the Bill of Rights to conclude that: "The Bill did not purport to define any new rights and freedoms. What it did was to declare their existence in a statute, and, further, by s. 2, to protect them from infringement by any federal statute."[13] This, in turn, led Mr. Justice Ritchie, in the *Miller and Cockriell* case,[14] when considering whether the death-penalty provisions in the Criminal Code contravened the Bill of Rights, to conclude that, since shortly after the enactment of the Canadian Bill of Rights, the Parliament of Canada amended the death-penalty provisions of the Criminal Code several times and did not include the *non obstante* clause of section 2 of the Bill of Rights, therefore Parliament did not assume that the death-penalty provisions were contrary to the "cruel and unusual" clause of the Bill of Rights. The result of this decision is that if Parliament did include the *non obstante* clause, then the Bill of Rights would not apply, but that also, when it does *not* include the clause, the Bill of Rights would not apply. The result of this 'frozen concepts' interpretation is that the Bill of Rights could *never* have effect. This has been one of the most important impediments to the effectiveness of the bill.

To overcome this defect, the new Canadian charter speaks in the present. Section 2, for example, proclaims that "everyone has the following fundamental freedoms"; section 10 provides that "everyone has the right on arrest or detention . . ."; and section 11 states that "any person charged with an offence has the right" to a number of listed protections.

The rights and freedoms included. Space does not permit discussion of more than the main changes and additions to the existing Bill of Rights that the new charter would effect. The ones dealt with here are changes to the "due process" and the "equality" clauses, and the additions of prohibitions against unreasonable searches and seizures and retroactive punishment.

One of the changes included in all the recommendations since 1968[15] is the separation of the "due process of law" clause that relates to liberty and security of the person, from the right to the use and enjoyment of property. Such separation might not prevent a future development in Canada of the "substantive due process" interpretation that was applied in the United States from the 1890s to 1930. However, while one can expect that since our Supreme Court has been most reluctant to apply *any* American jurisprudence concerning the Bill of Rights, it might not adopt the most criticized part of it, a separation of the protection of property from the "due process" clause might provide further assurance against such a development. In fact the charter makes no reference to 'property'. With respect to protection of the right to "life, liberty and security of the person," section 7 provides for "the right not to be deprived thereof except in accordance with the principles of fundamental justice." Although the last clause is more appropriate to administrative than to criminal proceedings, the full scope of the "due process" clause, as applied in the United States, is probably covered by sections 8 to 14 inclusive.

With respect to section 1(b) of the present Bill of Rights, all the proposals since 1968 have suggested adding the word 'equal' to the "protection of the law" clause, or even leaving out the "equality before the law" clause that comes before.[16] The really important question is whether adding an 'equal protection' clause is sufficient to reverse the position of Mr. Justice Ritchie, in the *Lavell* case,[17] in which he specifically rejected arguments that section 1(b) incorporated the 'egalitarian' concepts of the Bill of Rights of the United States. Instead, probably partly because of his 'frozen concepts' interpretation, he referred to English constitutional authority as a basis for deciding that the "equality before the law" clause had the same meaning that was given to it by Dicey in 1885 as part of the 'rule of law' principle: that is, that it merely implied that all individuals, whether private citizens or government officials, were equal before the law and the courts of the land.

Perhaps one need not worry overmuch about this Ritchie limitation in the *Lavell* case because on this point it was not a majority decision. In two subsequent decisions, the *Burnshine*[18] and *Prata*[19] cases, Mr. Justice Martland did not refer to this Ritchie definition, but instead seemed to accept that the "equality before the law" clause had certain egalitarian implications subject only to the reasonable limitation of "a valid federal objective." Nevertheless, to ensure that no future court adopts the Ritchie interpretation of the 'equality' provision, the new charter amends the clause to read "equality before *and under* the law." Moreover, not only is an 'equal protection' clause added, but in reaction to the *Bliss* case,[20] the clause is extended to provide for "equal protection *and benefit* of the law."

Further, the 'equality' clause includes the same grounds of non-discrimination that now appear in the Canadian Bill of Rights, as well as "age" and "mental or physical disability." Although, as in the United States, it is difficult to think of any bona fide occupational qualifications that would apply to the grounds that had been previously listed in the Canadian Bill of

Rights, it is obvious that these issues arise with respect to the new additions. Nevertheless, such qualifications must be inferred from the limitations clause in section 1 of the new charter, which will be discussed subsequently. It is important to note, in addition, that out of excessive caution, the 'equality rights' provision, in subsection (2), adds protection for "affirmative action programs." Since these are already explicitly provided for under most anti-discrimination statutes in Canada, and since North American experience clearly shows that rigid equal treatment of people who have suffered disadvantages in the past merely perpetuates inequality, it should have been obvious that an 'equality' provision recognizes the validity of such programs. This has been so in the United States. Although some affirmative action programs that actually impose quotas and require 'reverse discrimination' have been held invalid under the Civil Rights Act of 1964, they have not been held contrary to the "equal protection" clause in the Fourteenth Amendment.[21] Therefore all the other kinds of affirmative action programs, such as on-the-job training and merit criteria, should not be found to contravene the 'equality' clause. After all, this country has witnessed during the 1970s extensive and long-overdue affirmative action programs in the hiring and advancement of francophone Canadians in the federal public service. Surely this would not be found to contravene an 'equality' clause, even in the absence of section 15(2).

One cannot leave the 'equality' provisions without making reference to section 28, which provides that: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." It is difficult to see what this clause adds to section 15 and the other individual rights in sections 2, 3, and 6 to 14. It is impossible to imagine how words like 'everyone' or 'every citizen' or 'any person' or 'party' or 'witness' can possibly be defined as not including women. Perhaps, however, such a provision will ensure that courts will not avoid their responsibilities as occurred in the *Lavell* or *Bliss* cases.

Two additions to the list of prohibitions in section 2 of the Canadian Bill of Rights that have been included in all the recommendations since 1968 and are incorporated in the new charter are those concerning injunctions against "unreasonable searches and seizures" and the right not to be subjected to retroactive penal laws or punishment.

In the United States the "unreasonable searches and seizures" clause has probably been more important to the development of the interpretation of the Bill of Rights than any other. Most cases involving or leading to arrest also involve searches or seizures or both. Clearly they are a vital element in the administration of justice. Just as clearly courts should have the duty of assessing their 'reasonableness' on a case-by-case basis rather than, on the one hand, abdicating any supervisory role at all by admitting evidence obtained as a result of a search or seizure, no matter how brutally or inhumanly such action was conducted or, on the other hand, invalidating otherwise 'reasonable' searches or seizures on mere technicalities.

As far as retroactive penal legislation is concerned, not only has every proposal since 1968 (including that of the Quebec Liberal Party in 1980) recommended its inclusion, and not only does it form part of the Quebec charter as section 37, but it is also now an international obligation, pursuant to article 15 of the International Covenant on Civil and Political Rights which Canada ratified in 1976. The essence of this article has been included in section 11(g) of the new charter.

Another important addition should be noted in the 'legal rights' part of the charter. The "right to counsel" when arrested or detained has been expanded to include the right "to be informed of that right."

Finally, it is important to make reference to the provision that does not appear in any of the provincial or federal bills of rights, and that is the "mobility rights" in section 6. Subsection (2) of section 6 gives a right to all Canadian citizens and permanent residents to move to, and take up residence in, any province and to pursue the gaining of a livelihood in any province. Subsection (2) is, of course, made subject to laws of general application that do not discriminate "among persons primarily on the basis of province of present or previous residence," and those laws that provide for "reasonable residency requirements as a qualification for the receipt of publicly provided social services." In addition, at the Accord of 5 November 1981, it was agreed that provinces that have an unemployment rate higher than the national average might adopt affirmative action programs in favour of their residents.

Furthermore it should be noted that, on the one hand, section 6(2) serves as a constitutional entrenchment of what was affirmed by the Judicial Committee of the Privy Council in the turn-of-century cases of *Union Colliery* v. *Bryden*[22] and *Cunning-*

ham v. *Tomey Homma*.[23] It should also be noted that, on the other hand, without the addition agreed to in November 1981, such a provision would probably override recent Quebec legislation that confines the hiring of labour for construction jobs to regions of Quebec in which those jobs are located. The same probability would apply as well to section 4(3) of the Newfoundland Human Rights Act that permits preference to be given to Newfoundland workers and to goods produced, originating, manufactured, or distributed and serviced in Newfoundland unless both these measures were shown to be 'affirmative action'.

Clearly, however, although this is the kind of provision that one can expect in a federation, it would probably be limited by any province of Canada that might negotiate special status and, even more certainly, by a province that would separate from this country and enter into economic association. On the other hand, it should not be forgotten that the independent countries of Europe that have associated in the European Economic Community (EEC or Common Market) have nevertheless agreed to free movement of goods and workers among EEC members.

Limitations. The Victoria Charter, on the insistence of the provinces, included a limitations clause applying to the political civil liberties whose inclusion was agreed on. Similarly section 1 of the new Canadian charter contains the following limitations clause applicable, not just to the political civil liberties or fundamental freedoms, but to all the rights and freedoms proclaimed: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

The first point that must be noted is that, whether or not such a clause is included in a bill of rights, the courts will give a 'reasonable limitation' interpretation to what might otherwise seem to be unlimited rights or freedoms. Thus, although the First Amendment to the Constitution of the United States provides that 'Congress shall make no law . . . abridging the freedom of speech, or the press," the United States Supreme Court has repeatedly and consistently recognized that there are limitations that are justifiable as reasonable. It is for this reason that the Constitutional Committee of the Canadian Bar Association[24] recommended that a limitations clause is not necessary and, in part, detracts from the educational value of a bill of rights.

The only real question, therefore, is whether spelling out the limitations gives the Legislatures wider or narrower scope than might be applied by the courts in the absence of such specification. Arguments against such a limitations clause, in addition to those raised by the Canadian Bar Association, have held that such a clause seems to contemplate almost any limitation that a Legislature may wish to place on any particular right or freedom, and that such a clause could encourage the judiciary to abdicate its responsibility in judicial review by applying the opinion of Parliament in lieu of attempting an objective assessment. On the other hand, in favour of a limitations clause could be the fact that it is recognized in the European Convention on Human Rights, in most of the bills of rights provided by the United Kingdom for the newly independent members of the Commonwealth, and in the International Covenant on Civil and Political Rights. Therefore, although some will probably criticize such a limitations clause, it would not be out of line with various national and international bills of rights drawn up since the Second World War. It is even more important, however, that a limitations clause, properly restricted and placing the onus on the government to justify the limitations, encourages the courts to exercise review. These are matters that must be amplified.

The first question that could arise is whether a limitations clause applies equally to all rights and freedoms. With respect to freedom of expression, for example, the limitation in article 19 of the International Covenant on Civil and Political Rights is restricted to what is thought 'necessary' to constitute certain safeguards, such as those relating to national security or public order. Just by dictionary definition it would appear that a 'necessary' restriction requires a greater burden of proof than one that is merely 'reasonable', even if the latter has to be "demonstrably justified in a free and democratic society." This issue, however, is not as important as is that of the burden of proof. Unless the onus is on the government to prove that the limitations are necessary for the purposes specified, then the traditions of our courts indicate that they would probably defer to legislative opinion without much impartial evaluation.

It is probably more serious, however, that for the laudable purpose of substituting a limitations clause for section 6 of the War Measures Act, the charter introduces a limitations clause that is applicable to *all* rights and freedoms. Moreover section 6 of the War Measures Act comes into operation only rarely and with the specific invocation of that Act, while under the proposed section 1, limitations could be deemed to apply at any time.

The various national and international bills of rights referred to earlier do contain limitations clauses, but these apply only to the provisions dealing with fundamental freedoms and privacy, and specifically to such rights as those to a public trial. Section 1 would obviously be much wider. It would raise the possibility, for example, of a limitation on "the right of the individual to life" (s. 7), or "the right not to be subjected to any cruel and unusual treatment or punishment" (s. 12). Should such rights be subject to the limitations listed in section 1? It is pertinent to note on this point that article 4 of the International Covenant on Civil and Political Rights specifically recognizes that during times of "officially proclaimed" emergency, States' Parties "may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin." Furthermore paragraph 2 of article 4 says that "no derogation" may be made from those provisions dealing with, among other matters, "the right to life" (art. 6), and the "cruel, inhuman or degrading treatment or punishment" clause (art. 7), as well as the prohibition against retroactive criminal legislation. This standard is now part of our international obligations. Can we assure less?

One further issue relating to the limitations clause must be considered in possible constitutional change: that is, is there to be more than one bill of rights either because the charter is not, in the end, applied to all of Canada, or because one province gains a special status? If there is only one bill or charter, the limitations clause would not have to vary to take account of legislative jurisdiction of the component units. However, if each province were to have a separate bill of rights, or if there were one or more provinces with a distinctive status and an individual bill of rights, then such bills would surely not provide the permissive limitation that may be described as 'national security'.

In view of the accord reached on 5 November 1981, the subject of a 'limitations' clause cannot be left without reference to the agreement to include a *non obstante* provision whereby all the Legislatures and Parliament can specify that their laws shall operate "notwithstanding the *Canadian Charter of Rights and Freedoms.*" One might ask whether such a *non obstante* clause is necessary when section 1 of the charter provides a wider limitations clause than that permitted under the International Covenant on Civil and Political Rights. Nevertheless it should be pointed out that although, on the one hand, a limitation under section 1 would clearly be reviewable by the courts and might not be held constitutional, whereas the enactment of a *non obstante* clause would be overriding, on the other hand, a proposal to include the *non obstante* clause is a clear signal to the opposition and to the electorate that the governing party intends to override the charter. This is not a step that would be politically easy. It might be noted that just such a clause is to be found in all four of the existing bills of rights: the Canadian bill, and the bills of Alberta, Quebec, and Saskatchewan. In the more than twenty-one years that the Canadian Bill of Rights has existed, the *non obstante* clause in section 2 was used on only one occasion, that is, in the Public Order (Temporary Measures) Act that replaced the invocation of the War Measures Act on 2 December 1970, and that lasted until 30 April 1971. The Quebec government at one point proposed to include the *non obstante* clause in its first language bill (Bill 1), but the reaction was so strong that it was dropped from the language charter that is now in effect (Bill 101). On this point I cannot but repeat what I suggested in 1975:

> Although I believe that the Supreme Court should be able to declare legislation inoperative if it is inconsistent with the Bill of Rights, nevertheless I believe that Parliament, cognizant of the fact that in the opinion of the Supreme Court a certain legislative measure is contrary to the Bill of Rights, should be able to decide that the legislation should operate notwithstanding the Bill of Rights. I do not believe that a Supreme Court, even with a written Bill of Rights in the constitution, can ultimately stand in the way of a legislature determined to take certain action. All I ask of the Supreme Court and of a written Bill of Rights is that the legislature be conscious of the fact that an impartial tribunal, whose role it is to interpret and apply the law, has expressed its opinion that certain action is contrary to the Bill of Rights. Moreover, many of the cases which involve values protected by a Bill of Rights concern administrative, and not legislative, acts. Even in the United States, it is not so much Acts of Congress or the state legislatures that have been held invalid, as administrative actions taken pursuant to these Acts. Therefore, in these cases the impediment of parliamentary sovereignty on judicial review is not often at issue.

> . . . because the legislature will ultimately have its way over the courts, and because civil liberties are best protected if the issues are clarified in a kind of public dialogue between the legislative and judicial branches of government, I believe a notwithstanding clause like the one in the present Bill of Rights may be the only restraint we need place on the legislature. I am not much concerned with the question of entrenchment against future deletion or amendment because I do not believe that any future Parliament would be moved to amend the Bill of Rights except to strengthen it, and if times are so changed that I am proved wrong, even the Supreme Court and a written Bill of Rights would not stop such a Parliament. The electorate will. If it does not, then we will be in such a changed situation that Bills of Rights and Supreme Courts will be irrelevant.[25]

The question of effect or remedy

One would not expect that specific provision has to be made for a remedy for the enforcement of a bill of rights that purports to be 'paramount' with respect to inconsistent legislative or administrative acts until one considers the *Hogan* case.[26] In this case, although both the majority and minority decisions unquestionably held that the "right to counsel" in paragraph 2(c)(ii) of the Canadian Bill of Rights was infringed, the majority decision went on to hold that no remedy could be granted. Mr. Justice Ritchie, who again gave judgment on behalf of the majority, held that the evidence, even though illegally obtained, was "clearly admissible at common law," and that "whatever view may be taken of the constitutional impact of the Bill of Rights" did not necessarily mean that a breach of one of its provisions "justifies the adoption of the rule of 'absolute exclusion' on the American model which is in derogation of the common law rule long accepted in this country." He therefore ruled that the law courts "were correct in accepting [the evidence obtained while right to counsel was denied] in accordance with the rules of evidence governing the trial of criminal cases as they presently exist in this country."[27] Thus, although he declared that a right existed, he considered that he could not provide a remedy for its breach.

The *Hogan* case brings us to the following anomalous result: according to the *Drybones* case, if the Criminal Code were to provide that a request to retain and instruct counsel could be denied in compelling an accused to take a breathalizer test, this provision would be declared inoperative because it would be inconsistent with the Canadian Bill of Rights. On the other hand, when the denial of counsel does not have legislative sanction in that it merely takes place because of police initiative, then the Canadian Bill of Rights is to be ignored.

There is no avoiding the fact that in the absence of a rule declaring evidence obtained in contravention of the Bill of Rights to be inadmissible, or in the absence of some alternative remedy, the Bill of Rights can be infringed with impunity. Has there ever been a case in similar circumstances where enforcement through a civil remedy, such as that of damages for tort,[28] was worth the cost of bringing such action? Not really, since the Jehovah's Witnesses cases! But these resulted from the broader application of the Quebec civil law of delict.[29] There must be some considerable doubt about whether the Quebec cases would apply equally in the common law provinces.

In light of all this, it is clear that a 'remedies' provision such as that set out in section 24 of the charter is necessary:

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

It should be noted that there might be some variation in the remedies granted in Quebec, as long as the charter applies to that province, from those granted in the common law provinces because the civil law of damages and some administrative law remedies are different. On the other hand, a variation *in form* of the remedy in administrative law should not necessarily lead to a variation *in effect* also. Further, section 24 should now free the courts, in granting money damages, from the confines of the common law of tort and provide the wider remedy of the Civil Code's law of delictual responsibility.

To Conclude: What Effect Would the Choice of Options Have on the Kind of Bill of Rights Adopted?

The short answer is: very little. Whether language rights would, or would not, be included in a bill of rights is treated in another chapter of this study, but as far as concerns the individual rights considered here, the various proposals put forth in Canada, whether at the provincial or at the federal level, and whether now in effect in any particular jurisdiction or not, exhibit very little substantive variation. It is true, as discussed earlier, that the Quebec charter includes a number of provisions that are not to be found in the new Canadian charter. However, as was argued, there is less variation with respect to those Quebec provisions that are given overriding authority by section 52, and to the extent that they go beyond the Canadian charter, there is no reason why they should not continue to operate.

The absence of important variation is not surprising when one considers that there is not much substantive variation among the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the British-drafted bills of rights for the 'New' Commonwealth, the bills of rights of West European countries or the United States, the proposals of the Canadian Bar Association or those of the Quebec Liberal Party in its Beige Paper, and the new charter. The more important question is, who is to interpret the bill, or bills, of rights adopted? Which Supreme Court will have jurisdiction? Who will appoint the members? These are the crucial questions, but they are discussed elsewhere in this over-all study.

Notes

1. For the application to Quebec of s. 133 of the BNA Act, see *Attorney-General of Quebec* v. *Blaikie et al.*, [1979] 2 S.C.R. 1016. For the application of s. 23 of the Manitoba Act, see *Attorney-General of Manitoba* v. *Forest*, [1979] 2 S.C.R. 1032.

2. The preamble to the BNA Act incorporates "a Constitution similar in principle to that of the United Kingdom," which thereby introduces the doctrine of parliamentary supremacy into Canada's Constitution. For a full discussion, see W.S. Tarnopolsky, *The Canadian Bill of Rights*, 2d rev. ed. (Toronto: McClelland and Stewart, 1975), pp. 31–86, 92–116.

3. See the Supreme Court of Canada's decision in *Attorney-General of Manitoba et al.* v. *Attorney-General of Canada et al.*, 28 September 1981, (1981) 6 W.W.R. 1 (Supreme Court of Canada).

4. This part was written before the Supreme Court's decision on 28 September 1981, which held that there was such a convention, even though legally the Parliament of Canada could request such an amendment by unilateral action.

5. For an early agreement in favour and a review of Commonwealth authorities, see W.S. Tarnopolsky, *The Canadian Bill of Rights* (Toronto: Carswell, 1966), pp. 92–116; P.E. Trudeau, *Federalism and the French Canadians* (Toronto: Macmillan, 1968), pp. 52–62; P.E.Trudeau, *A Canadian Charter of Human Rights* (Ottawa: Queen's Printer, 1968); Special Joint Committee of the Senate and of the House of Commons, *Report: The Constitution of Canada* (Ottawa: Queen's Printer, 1972), Chapter 9; Task Force on Canadian Unity, *A*

Future Together (Ottawa: Minister of Supply and Services Canada, 1979), Recommendation 28; Canadian Bar Association, Committee on the Constitution, *Towards a New Canada* (Toronto, 1978), Chapter 4; Constitutional Committee of the Quebec Liberal Party, *A New Canadian Federation* (Montreal, 1980), Chapter 3.

6. See, for example, B. Laskin, "Canada's Bill of Rights: A Dilemma for the Courts," *International and Comparative Law Quarterly* 11 (1962): 519–36.

7. *Regina* v. *Drybones*, [1970] S.C.R. 282.

8. The right to non-disclosure of confidential information; the non-discrimination rights; the rights to petition, be a candidate, and vote; and the judicial rights (but not the fundamental freedoms). For more detail, see text, p. 291. This refers to and quotes Quebec Charter, i.e., *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C–12, s. 52, and Saskatchewan Code, i.e., Saskatchewan Human Rights Code, S.S. 1979, C. S–24. 1, s. 44.

9. "A New Bill of Rights in the Light of the Interpretation of the Present One by the Supreme Court of Canada," in Law Society of Upper Canada, *The Constitution and the Future of Canada*, Special Lectures, 1978 (Toronto: DeBoo, 1978), p. 181.

10. *Robertson and Rosetanni* v. *The Queen*, [1963] S.C.R. 651.

11. *Ibid.*, 654.

12. [1975] 1 S.C.R. 693.

13. *Ibid.*, p. 702.

14. *Miller and Cockriell* v. *The Queen*, [1977] 2 S.C.R. 680.

15. This was first proposed in the 1969 federal policy paper: Canada, Privy Council, *The Constitution and the People of Canada: An Approach to the Objectives of Confederation, the Rights of the People and Institutions of Government* (Ottawa: Queen's Printer, 1969).

It was supported in 1972 by the Special Joint Committee of the Senate and House of Commons on the Constitution: Special Joint Committee of the Senate and of the House of Commons, *Report*.

It was proposed by the Manitoba Law Reform Commission in its study paper: Manitoba Law Reform Commission, "The Case for a Provincial Bill of Rights," Working Paper No. 4 (Winnipeg, 1974).

It was submitted again in 1978 in the charter proposed in Bill C–60: Canada, Parliament, House of Commons, *Bill C–60: An Act to Amend the Constitution of Canada*.

It was supported by the Canadian Bar Association recommendations: Canadian Charter of Rights and Freedoms, s. 5.

16. Neither the Quebec charter nor the Saskatchewan code has an equivalent clause, probably because both include detailed anti-discrimination provisions.

17. *Attorney-General of Canada* v. *Lavell*, [1974] S.C.R. 1349.

18. *Regina* v. *Burnshine*, [1975] 1 S.C.R. 693.

19. *Prata* v. *Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376.

20. *Bliss* v. *Attorney-General of Canada*, [1979] 1 S.C.R. 183.

21. See *Regents of the University of California* v. *Bakke*, 98 S.Ct. 2733 (1978) and *United Steel Workers of America* v. *Weber*, 99 S.Ct. 2721 (1979).

22. 1899 A.C. 580.

23. 1903 A.C. 151.

24. See notes 5, 17.

25. W.S. Tarnopolsky, "The Supreme Court and the Canadian Bill of Rights," *Canadian Bar Review* 53 (1975), pp. 649, 650–51.

26. *Hogan* v. *The Queen*, [1975] 2 S.C.R. 574.

27. *Ibid.*, p. 583.

28. [The breach of a duty imposed by law, whereby some person acquires a right of action for damages.]

29. [A violation of law or right.]

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The Future of Language Rights under Canada's Constitutional Options

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The Future of Language Rights under Canada's Constitutional Options

The Present Situation

Language Rights in Canadian Life

Before examining how future constitutional change in Canada may affect language rights, it is useful to review briefly the present situation as it affects language and the relation of that situation to our present Constitution. While some of the material that follows may seem to be a statement of the obvious, my objectives are to identify the key elements in the present language picture and to determine how, if at all, these elements are influenced by constitutional factors.

The English language dominates all aspects of life outside the home in every part of Canada except in Quebec and in certain areas of New Brunswick and Ontario. In most of Quebec, French now holds the dominant place, although its domination is perhaps not as absolute as that of English in the other provinces. In those areas of New Brunswick, Ontario, and Quebec, where neither English nor French dominates life outside the home, the two languages roughly share the paramount place. Within this framework of general domination by English or French, or the equal status of both, there are many language communities (including French and English communities in areas where they constitute minority-language groups) that in their private lives use a language other than the dominant one. Depending on the size and concentration of such communities, its members publicly speak their community language to an extent that ranges from minor use to localized dominance.

Except for recent immigrants and some older immigrants who have not become fluent in a second language, most Canadians who belong to one of these smaller language communities are bilingual, at least. In general their second language is English, although in those areas where French is dominant or shares dominance with English, they often speak French. Bilingualism is also common among French Canadians in those areas where English and French share dominance, and there is a respectable level of bilingualism among French Canadians even in areas where French is the dominant language. However, bilingualism is much less common among English Canadians than among correspondingly situated French Canadians.

Since the work of the Royal Commission on Bilingualism and Biculturalism[1] in the 1960s, governmental activity in relation to language in Canada has noticeably increased. This activity signifies that language is currently a major political issue. It is, moreover, a political issue on which many Canadians have strongly held and sharply divided points of view.

Recent government activity with respect to language falls into three broad categories, all involving life outside the home. These are the language of government services, the language of work, and the language of education. Legislative measures by the federal government[2] and by the Governments of New Brunswick[3] and Ontario[4] have been directed to making their services available in both English and French; indeed the federal government and the Government of New Brunswick are aiming at making every government service available in either language, according to the wishes of the person receiving the service. Quebec,[5] on the other hand, has introduced legislative measures designed primarily to make French the language of work in that province in all but a few exceptional situations.

In the field of education, Quebec has traditionally had English and French schools of comparable quality. Similar systems existed in the early years of Confederation in other parts of the country, where there were local concentrations of francophones. In Ontario[6] and Western Canada,[7] these systems were disrupted in the late nineteenth and early twentieth centuries by provincial measures deliberately intended to restrict French-language education. In Atlantic Canada minority-language schools suffered from provincial neglect.

In recent years the provinces other than Quebec have moved to increase availability of French-language education; their level of effort has been roughly related to the size of each province's francophone minority. In the Prairie provinces non-French minority-language schools have also been established. In Quebec the parallel English- and French-language educational facilities remain substantially intact, but measures have been taken to ensure that graduates of English schools possess a working knowledge of French.[8] Quebec's most recent educational measures are designed to restrict access to English schools to its own English minority and to end the tendency of other minority groups in the province to gravitate to the English schools.[9]

Language Rights and the Present Constitution

Prior to the enactment of the Canadian Charter of Rights and Freedoms,[10] there were only very limited provisions relating to language in the Canadian Constitution. In theory these provisions guaranteed the right of legislators in the federal Parliament and in the Legislatures of Manitoba and Quebec to use either English or French in their discussions and to make legislation and legislative records in these same jurisdictions available in both languages; they also allowed persons to use either French or English in federal courts and in the courts of Manitoba and Quebec.[11] In fact, these rights as they applied to the French language were effectively suppressed in Manitoba for nearly ninety years,[12] although litigation in the late 1970s determined that this suppression was unconstitutional.[13] Quebec acted in 1977 to suppress the use of English in a corresponding manner,[14] although its action was also declared unconstitutional.[15] It is also arguable that equivalent constitutional provisions once existed for Alberta and Saskatchewan, but any such rights were suppressed before these jurisdictions became provinces, and as a result the constitutional picture is much cloudier.[16]

Where these limited provisions already exist, they remain unaffected by the charter,[17] which re-enacts the same provisions for the federal government and extends them to New Brunswick.[18] Additional status is given to English and French federally and in New Brunswick by including in the charter further provisions based on the federal and New Brunswick Official Languages Acts.[19] These provisions make the two languages official, accord them equality of status, establish equal rights and privileges pertaining to their use in all government institutions, and give members of the public the right to be served in either language by those institutions.[20]

In the early years of Confederation, French-language schools outside Quebec were effectively protected by constitutional guarantees of the pre-Confederation rights of denominational schools.[21] This effective protection continued for English-language schools in Quebec until the 1970s.[22] It was not ruled consistently by the courts, however, that these provisions did not create judicially enforceable protection of a right to English-language or French-language education.[23] The possibility has existed that these provisions authorize federal government intervention to preserve minority-language rights in education,[24] but the federal government has avoided any invitations to use this power.

The charter makes major reforms relating to the language of education. It creates a constitutional right for Canadian citizens whose mother tongue or language of primary education is English or French to have their children educated in that language anywhere in Canada on condition that the numbers of either group in a particular province warrant the provision of the necessary school facilities; however, this right is subject to approval by the Quebec Legislature before it applies fully in that province.[25] To the extent that this right is in force in Quebec, it will partially invalidate that province's language law, which grants access to its English schools only to the children of its historic anglophone minority and not to the children of other anglophone Canadians.[26]

The Probable Impact of Redistribution of Powers

General Effects

Future constitutional reform in Canada may take the course of some redistribution of powers between the federal and provincial governments, but no fundamental reconstruction of the basic scheme of Confederation; such reform would reflect a determination to pursue merely evolutionary or frictional adjustments. This course is unlikely to produce radical changes in language or in most other aspects of Canadian life. This does not mean, however, that it is easy to project the likely impact on language of such a constitutional approach. As I have already stated, Canadians have developed sharply divided views about the direction we should be taking in relation to language if there is to be no constitutional change. It is unlikely that evolutionary constitutional change will influence movement significantly in one direction or the other.

Although there are shades of opinion in between, two fundamentally opposed approaches dominate the current language debate. One view is that if Canada is to survive as a nation, both anglophone and francophone Canadians throughout Canada will have to enjoy at least a functional minimum of access to services in their own language. Otherwise, francophone culture in Quebec and anglophone culture elsewhere in Canada will become increasingly isolated from each other, and the logic in support of an independent Quebec will become irrefutable. On this premise the experience of countries like Belgium and Switzerland that have tackled language problems by creating completely unilingual districts is inapplicable to Canada because the distances involved here make it difficult, for example, for a francophone far away from Quebec to maintain satisfactory working contact with francophone culture in that province. Unless such individuals have local access to appropriate facilities in their own language, the pressure towards rapid assimilation to anglophone culture of francophones outside Quebec and the consequently reinforced isolation of francophone culture within Quebec will be unavoidable.

The opposing view is that the long course of Canadian history has seen the suppression of the French language and the inexorable assimilation to anglophone culture of francophones outside Quebec, as well as the recent trend in Quebec towards reciprocal suppression of the English language, and that this development represents a natural course of events. On this premise efforts to encourage the use of both English and French throughout Canada only create friction that leads to ill-feeling and disunity. More harmonious relations between francophones and anglophones might result if each group were permitted to make its own language the one official tongue in the province or provinces where it is in the majority.

Most federal political leaders have so far held the former view, and a substantial proportion of provincial political leaders have paid at least lip-service to it. On the other hand, the implications of the recommendations made in 1979 by the Task Force on Canadian Unity have created some support for the latter view, although in theory the Task Force supports nation-wide language rights.[27]

In the final analysis it is probably concern for equity and justice towards members of minority-language groups, rather than conviction about the consequences for Canadian unity, that throws the balance of opinion in favour of nation-wide language rights. Such considerations of justice and equity will not necessarily prevail, however, in the final hard bargaining over a revised division of power in Canada. Indeed, since any such revision will be likely to increase provincial power,[28] it may also tend to place language more firmly under provincial authority; this tendency may adversely affect any policy to provide nation-wide language rights.

Under a process of constitutional change involving only a redistribution of powers, the trends of the 1970s, reinforced by the langage provisions of the Canadian Charter of Rights and Freedoms, will probably continue.[29] This means that the federal government will continue to promote access to services in both languages in areas within its own control. English will continue to be the only language in which provincial services are generally available except in New Brunswick and Quebec. There may be some extension of public services to minority-language groups, but there is unlikely to be any particular emphasis on the French language in the Western provinces. Such emphasis is likely in Ontario because of the substantial size of the French minority and its heavy concentration in Northern Ontario. The absence of any other linguistic minority of significant size will produce similar emphasis on French in any extension of minority-language services in the Atlantic provinces. The proximity of Quebec will also increase the use of French in any extension of minority-language services in Eastern Canada.

In New Brunswick efforts towards attaining greater equality of status between English and French are likely to continue. In Quebec the movement to put French in the same overwhelmingly dominant position that English enjoys in most of the rest of Canada is likely to continue. If, however, French Quebecers ever become sure that the disproportionate economic power of anglophones in the province has either been broken or brought permanently under control, any efforts to suppress other languages are likely to be relaxed.

In the field of education, language developments for the foreseeable future are likely to be dominated by the educational provisions of the charter.[30] English and French minorities will continue to press on both political and legal fronts for availability of education in their own language. It is unlikely that complete accessibility to English and French minority-language education will be achieved even in the long term. Thus an extended period of litigation over the implementation of the charter is probable.

Other minority linguistic groups in Canada that have historically tried to maintain a strong ethnic culture by preserving their own languages will also continue to press for availability of education in those languages. In areas where such minorities are large enough to make minority-language education both economically feasible and politically significant to the unit of government responsible for school administration, the availability of this education seems likely to continue where it now exists and to increase elsewhere. At the same time the linguistic majority in almost every province is likely to insist that minorities receive sufficient instruction in the majority language to become reasonably competent in it. The one exception is likely to be New Brunswick, where the francophone minority is large enough to resist such pressure effectively and concentrated enough to avoid any general need to learn English. Since the federal government will be promoting the use of both English and French in the federal public service, and since a unified economy will be creating a demand for some bilingual capacity in national operations within the private sector, there will also be some demand for effective second-language training among members of the anglophone and francophone majorities in the various provinces.

Effects on the Constitution

In the constitutional discussions of the 1960s and 1970s, the federal government regularly included language provisions among its proposals.[31]

In the main, language rights involving the federal government have been incorporated into the provisions of the Canadian Charter of Rights and Freedoms. These provisions cover the official status and equality of English and French, the use of both languages in Parliament and the courts, and access to bilingual government services.[32]

During the same period the federal government advocated that similar policies be adopted for all provinces. When the provinces failed to agree about language rights, Ottawa responded by developing a 'shopping list' of language rights from which each province seemed to select those that the federal government was able to 'sell' it on political grounds. This process indicated that the federal government was not strongly committed to provincial language rights. Where the language provisions of the charter[33] apply to the provinces, they follow previous trends. Initially the federal government made only one provision applicable to the provinces; this was based on a political undertaking that the provincial premiers had given one another to provide minority-language education wherever numbers warranted.[34] Language provisions for New Brunswick were added at the request of that province; similar provisions for Ontario were not included because of the resistance of that province's government.

In light of the controversy that surrounded the introduction of the charter, the lack of federal pressure for more substantial language provisions affecting the provinces may reflect no more than that government's avoidance of the additional controversy such language provisions would have aroused. In future constitutional reform, particularly reform involving a more substantial redistribution of legislative power, the federal government might adopt a stronger, more principled position on language rights; it might, too, succeed in gaining provincial concessions.

It seems more likely, however, that the *fait accompli* of the language provisions in the charter will block meaningful consideration of this issue in further discussions of constitutional reform. Many participants will be reluctant to reopen the debate. The fact that language rights have already been expanded will harden opposition to additional language rights. While the minorities directly affected will be anxious for improved provisions, many members of the public, whose sympathetic support is needed, may consider the matter already disposed of.

One of the objectives of constitutional entrenchment is to ensure that the entrenched provisions cannot easily be changed. Entrenched provisions have an inertia that makes them nearly as difficult to improve as they are difficult to remove. Before the charter was proposed, an impetus to reform constitutional language rights had developed that made some such reform almost inevitable; but there is a strong likelihood that the reforms of 1981 have effectively absorbed this impetus. The more limited the scope of future constitutional reform in Canada, the more likely is this to prove true.

The Probable Impact of Special Status

General Effects

Any adoption of special constitutional status for a single province in presently foreseeable circumstances would likely result in acceptance of the premise that Quebec's provincial government requires a higher level of autonomy to realize its linguistic and cultural aspirations. It is implicit in this premise that it is the provincial government in Quebec that will carry the primary, if not, indeed, the only, responsibility for pursuing its own linguistic and cultural aspirations.

While other provinces besides Quebec may look for special status, it seems unlikely that in the foreseeable future any other province will pursue this objective to realization. The end of any such provincial efforts, if they are successful, is almost certain to be a general devolution of powers to all provinces. The complications of a system involving several different federal-provincial constitutional relationships would simply be too horrific for any federal government to contemplate. Since it is improbable that any province other than Quebec would carry frustrations with a tough federal position to the point of actual secession, the federal government is unlikely to accede to any such demand for special status. It is more probable either that political pressures will build until a general change applicable to all provinces comes about, or that the situation will remain unresolved unless, as often happens with Canadian issues other than the cultural and linguistic aspirations of Quebec, at some stage the pressure simply dissipates.

Special status for Quebec, it seems, would inevitably reinforce the tendency to divide the provinces into a French-speaking Quebec and an English-speaking Canada-outside-Quebec. If this happened, Canada's federal public service would no longer be responsible for a number of programs in Quebec for which it would retain responsibility in the other provinces. This circumstance would exaggerate the dominance of anglophones in the public service as it was exaggerated before the efforts made between 1965 and 1980 to strengthen the francophone role in the federal government. Federal programs relating to language and culture would be oriented to the needs of the predominantly English provinces, since the prime purpose of special status for Quebec would be to give it control over those matters in its own province. It is inevitable, therefore, that such federal programs would reflect English Canadian preferences.

The federal government would continue to show some measure of concern for minority groups in all parts of Canada, but that concern would almost certainly be peripheral to the government's central missions. In reality this change might not produce any substantial difference in the flow of tangible benefits from the federal government to such minorities since, in the great crises of Canadian history, federal support for anglophone and francophone minorities has been more moral than physical, even in recent years. The spirit of such a régime, however, would be markedly different from that of federal language policy from 1965 to 1980.

The recognition that Quebec is uniquely responsible for francophone cultural and linguistic aspirations in Canada would likely halt, if not actually reverse, recent growth in the provision of French-language services in Canada's other provinces. The situation in New Brunswick would be particularly problematic. The example of Quebec's special status would likely increase support for Acadian autonomy, while the probable reduction of federal concern for promotion of French language and culture might undermine the resolve of New Brunswick's government to work towards equality of status for English and French. While francophones in New Brunswick are in a relatively strong position politically, the uncertainty caused by these developments could definitely impede progress in the provision of French-language services there. Similar tensions would arise in Northern Ontario, and the likelihood seems high of a halt, at least, in the progress towards extended French services in Ontario.

Special status for Quebec would obviously involve a mandate for that province to concern itself particularly with developing and preserving the French culture and language. The carrying out of this mandate would likely entail the continuation of policies to restrict the availability of English-language education. The view that it is advisable for a linguistic minority to isolate its children and young people during their education from the pressures of a linguistic majority seems widely expressed in

Quebec literature on the language issue.[35] Since Quebecers would still see themselves as a linguistic minority in the larger Canadian and North American contexts, special status is unlikely to change their opinion on this matter. Because the concept of special status would remove the possibility of federal intervention on behalf of Quebec's anglophone minority, Quebec is likely to work openly for accelerated assimilation of anglophone Quebecers. In case this sounds like an implied criticism of Quebec's objectives, it should be noted that in reality such policies in Quebec would do much to make it a province like other provinces, where French-language education for the francophone minority has long been neglected, and where only modest improvements in this area have been made in recent years. In this sense the continuance of a strong English-language education program in Quebec right into the 1980s has effected more of a 'special status' than would any future program to dismantle the minority-language school system in Quebec.

Elsewhere in Canada minority French-language education is likely to receive the same treatment as French-language services generally. Any gradual growth of recent years is likely to be halted since the advancement of French culture and language would be perceived as Quebec's responsiblity rather than that of the whole nation. To the extent that the federal government provided fewer services in French and did less to develop programs oriented to French culture and language, the incentive for English Canadians outside Quebec to obtain second-language education in French could decrease. This, in turn, could further diminish the general availability of French-language education.

Effects on the Constitution

While special status for Quebec would effectively reduce the role of the federal government in advancing the French culture and language in Canada, the government is likely to maintain in principle its present position that both English and French should be recognized as offical languages for federal purposes. If this were not so, there would be cause to fear that special status would only be a step in a progressive alienation of Quebecers from the federal government. Indeed, the people of Quebec will probably expect some language guarantees at the federal level as a condition of their continued allegiance to the federal system in any form. It is likely, therefore, that just as in the event of a redistribution of powers, constitutional provisions relating to language at the federal level would be the same under special status as they are in the Canadian Charter of Rights and Freedoms:[36] both English and French would be recognized as national official languages, with provision for the use of either in the legislative and judicial branches of government and in other federal agencies.

The adoption of special status for Quebec would probably lead to the conclusion that basic protection of the French language depends more on francophones exercising majority control over the Quebec government than on any constitutional guarantees. This would be likely to increase resistance in all provinces to the imposition of new constitutional language guarantees, although the provincial guarantees in the charter for New Brunswick would undoubtedly remain because of the relatively substantial size of the francophone minority in that province.

In light of the 'special status' concept that protection of the French language is primarily the task of Quebec, there is a definite possibility that under this arrangement, present provincial language guarantees, that is, those in Manitoba[37] and Quebec,[38] would be eliminated. In fact, in its 1978 proposals,[39] the federal government indicated a willingness to make this change in Manitoba.

The way in which special status came about would influence the possibility that Quebec might continue to concede limited rights to its anglophone minority to gain support for and to counterbalance the expanded role of its francophone majority. If special status is the result of negotiations by a Quebec that has adopted this arrangement as its first choice, the province might realistically be expected to retain language guarantees as a concession to anglophone Quebecers. If, however, special status comes about as a compromise adopted as an alternative to Quebecers' expressed preference for withdrawal from the federation, language guarantees for Quebec's anglophones would be much less likely, since Quebec, in that case, would already be making a concession in accepting special status. The federal government might, therefore, be reluctant to press for the further concession of language guarantees that would limit Quebec's freedom to follow its language objectives.

The concept of special status would also seem unfavourable to the retention of new minority-language education rights at the provincial level as endorsed by the charter.[40] However, the inclusion of these rights in that charter, despite provincial objections, suggests a strong federal commitment to them. As with provincial language rights, the resolution of the education issue in Quebec might ultimately depend on whether special status came about as the first choice of Quebecers or as a compromise adopted in place of their preference for separatism. If, as a condition of remaining part of Canada, Quebec insisted on the removal of minority-language-education provisions from the Constitution in order to reinforce its power to protect the French language, it is likely that the federal government would give way.

The restriction of minority-langage rights to maximize Quebec's ability to promote and protect the French language is a relatively recent development in the province. It is conceivable that Quebec's more traditional tolerance towards its English minority will reassert itself, particularly if moves toward greater provincial autonomy give the province increasing confidence in its ability to control effectively its own linguistic destiny. In that event, Quebec might readily accept the retention of language rights that are already established at the time when the matter of further constitutional reform is resolved.

The Probable Impact of Sovereignty-Association

General Effects

Under sovereignty-association Canada would consist of two separate countries that for internal political purposes would function separately, whatever international relationship the 'association' aspect might involve. The right of minority groups to preserve their cultural identities and to enjoy protection to this end from the whims of a popular majority with which they are politically associated has been recognized as an appropriate international concern.[41] For most practical purposes, however, the rights that minorities enjoy are subject to the internal politics of the sovereign state in which they live.

Under sovereignty-association, the sovereign states of Canada and Quebec would be predominantly anglophone and francophone respectively. As a matter of internal politics, the respective francophone and anglophone minorities would be relatively powerless both because of their absolute numbers and because of their lack of an alternative power focus such as both enjoy under the present Canadian federal system, where francophones are a majority in one province.

The federal government would no longer have to respond either to a francophone minority group as large as that found in the present Province of Quebec or to the internal pressures of a francophone-dominated Quebec government. Thus any perceived need for the federal government to maintain a visible presence on the language-rights issue would tend to disappear Francophones in Canada would become like any other ethnic minority. The federal attitude would be, at best, toleration rather than positive encouragement. Similarly, while in the past anglophones in Quebec have never needed much in the way of positive encouragement from that provincial government, they certainly could not, in the future, expect to receive any from a sovereign Quebec.

The effect of this lack of support from both federal and provincial governments would be to weaken the position of minority-language groups in both Canada and Quebec. Admittedly there would be some countering influences. In Quebec the necessity for doing business with the anglophone populations of Canada and the United States would continue to encourage Quebecers to learn English as a second language. Some separatists have even suggested that improved self-confidence among francophones in a sovereign Quebec might actually increase their receptiveness to the English language by eliminating resentment against what is perceived as anglophone domination through the federal system.

Similarly, in English Canada, there might also be increased receptiveness to French as a second language, with the removal of resentment that French is being forced on anglophones as a concession to the Province of Quebec. Quebec's sovereignty could also help to make Canadians more aware that if they want to visit Quebec, they ought to learn to speak French since Quebec is not, as many anglophones seem to think at present, a place where one has a right to be catered to in the English language.

If, however, both anglophone and francophone minorities became national minorities in all respects, the real status of the English language in Quebec and of the French language in Canada would almost certainly be reduced beyond any gain to be made by depriving narrow-mindedness on both sides of its *raison d'être*. Both the minority groups, who are the real practitioners of their minority culture and language, would themselves be net losers because of their political isolation from the respective centres of anglophone and francophone culture in Canada and Quebec. These groups should be the real focus of concern in considering the language issue. Any loss that they would suffer, therefore, is more significant than the possible areas of gain.

In both countries the accessibility of the minority language would likely decline in every respect, including the provision of government services and the availability of education. There would probably be some regional variations, particularly in 'Canada', since it would continue to be a very large geographical area with a wide range of local circumstances. In northern New Brunswick and Ontario, for example, French services would be apt to continue as a sheer necessity of effective communication between the government and its citizens.

The historical diversity of ethnic backgrounds in the Prairie provinces has provided minority-language educational opportunities for a variety of minority groups, while elsewhere such opportunities have largely been limited to English and French minorities. The common interest of all minorities in the educational systems of the Prairie provinces may give support that will be lacking elsewhere to the existing minority-language systems. On the other hand, the demand for other minority-language schools has, to some extent, been a reaction to the national pressure for francophone schools, and without this pressure the entire system of minority-language schools could decline.

Effects on the Constitution

Although, in theory, constitutional provisions dealing with matters such as language rights are designed to place those matters above politics, the fact is that the provisions themselves flow from a basis of political support. A good example of the effect of politics may be found in the specific content of the Trudeau government's various drafts of a proposed bill of rights.[42]

It is doubtful whether anywhere in Canada today, except in New Brunswick, there is a sufficient political base for language guarantees to bring about their inclusion in a constitution if Canada and Quebec should form separate sovereign states. Internal policy is unlikely to bring such guarantees into the constitution of either state.

The negotiation of the special international relationship embodied in the sovereignty-association concept would create another possibility: mutual concern over the future prospects of the anglophone minority of Quebec and the francophone minority of Canada might induce both countries to agree to a system of minority protection as part of their international arrangements. Such a system might be incorporated into the constitutions of both states or made part of an overriding mutual obligation. Barring a subsequent breakdown in their international agreement, the practical effect under either arrangement would be substantially the same.

There would be a reasonable possibility of such protection coming about under the association proposed by the Lévesque government in Quebec, although the proposal makes no mention of such measures. Such protection could be helpful, from Quebec's point of view, as a means of gaining support for sovereignty-association among francophone minorities outside Quebec. These minorities have some reservation about sovereignty for Quebec because of their justifiable fears that it would weaken their position, and perhaps because of a certain resentment arising from their impression that Quebec is no longer their cultural ally. Such reservations could be significantly moderated by a promise of internationally guaranteed minority rights, particularly since this promise would provide more guaranteed rights than these minorities now enjoy. Some francophones in Quebec might also support sovereignty-association more comfortably if it included this provision. In practical terms such guarantees would facilitate continued population mobility, which the Lévesque-government proposals favour.

From the perspective of the Canadian government, minority-language guarantees would meet concerns of the business community about maintaining effective commercial relations between Ontario and Quebec. They would also create a community of interest in the area of language that might, at some future time, encourage an interest in a closer relationship and even the re-entry of Quebec into Canada's federal system. In other words, Canada and Quebec, in working out a new relationship, might well come to some explicit disposition of the language question that would parallel the language provisions in the existing Constitution for reasons very similar to those that led to their adoption in the first place. The major barrier to this development is that for largely tactical reasons, neither party may see fit to introduce such a proposal. In pursuing sovereignty-association the Quebec government might not want to risk a reaction from the core of its separatist support by introducing a proposal for language guarantees that might be seen as preserving the very *status quo* that the separatists want to change. The language issue is, after all, central to the separatist cause. For its part the federal government would be attempting to persuade Quebecers to remain in the federation by showing a national concern for the French language. It might be afraid of undermining its own position if it were to suggest a mechanism by which the same result could be achieved through sovereignty-association.

If agreement is reached on such language provisions, these are likely to relate to matters such as education and day-to-day government services that directly affect individual minority members, rather than to more formal matters such as the Legislature and the courts. It was the symbolic importance of the latter institutions that led to their explicit mention in the language guarantees of 1867. Under sovereignty-association the symbolic act would be the creation, not of a unified Canada, but of an independent French state in North America. It would be inconsistent with the spirit of this creation to make it officially bilingual at the highest levels of government. The real concern of minorities is with the language of their daily lives, and any language guarantees under sovereignty-association would surely take this reality into account.

The Probable Impact of Quebec's Independence

General Effects

If Quebec were to become independent without forming an association with the rest of Canada, the linguistic situation within each country should be virtually indistinguishable from that under the sovereignty-association option. Canada and Quebec would be separate for internal political purposes, and in the internal politics of each country, the respective linguistic minority of anglophones or francophones would be relatively powerless. For most practical purposes, each country would incline toward official unilingualism, with the possible exception of continued support for official bilingualism in New Brunswick. Anglophone and francophone minority groups might enjoy a certain tolerance from the linguistic majority, but it is unlikely that this would extend beyond the tolerance shown to various other linguistic minorities. The usefulness of the minority language as a tool for commerce with a neighbouring foreign state might somewhat increase its acceptance, but the immediate accessibility of services in the minority language to its daily users would almost certainly decline.

The situation could be significantly affected by the way in which separation came about. Sovereignty-association, by definition, assumes either that the original separation will be friendly or that the differences involved in an unfriendly separation will be substantially reconciled. A complete separation could be friendly also, but it is more likely to be unfriendly. If it is unfriendly, its nature implies that differences will not be reconciled, at least in the short term.

In the event of an unfriendly separation, there would be a risk that the linguistic majorities in Canada and Quebec would vent their ill-feeling on the French or English linguistic minority within their borders. Any real prospect of tolerance for the one or other minority group would be substantially less than under sovereignty-association. Indeed there would be considerable risk of strongly repressive short-term measures, although in the long run tolerance might be restored.

In summary both anglophone and francophone minorities might suffer substantially in respect of opportunities to use, maintain, and develop their culture and language if Quebec were to separate completely from Canada; at best these minorities might hope for toleration and a status similar to that of other present linguistic minorities. This would apply to education as well as to other matters.

Effects on the Constitution

If Quebec became an independent state through a friendly process of separation, it is likely that its constitution and that of Canada would be silent on the subject of language. Most countries in the world that are substantially unilingual leave the minority-language issue to be resolved by common usage rather than by the constitution. Canada and Quebec would probably follow this pattern. As a result of internal political forces, minority-language guarantees would probably not be included either in Quebec's constitution or in that of Canada. New Brunswick alone of the Canadian provinces might enact language guarantees. Moreover, without the attention to mutual concerns involved in establishing an economic association between Quebec and Canada, there would be virtually no prospect that the two countries would consider such guarantees an international obligation.

In the event of an unfriendly separation between Quebec and Canada, resentment towards the respective anglophone and francophone minorities might escalate to the point of affecting the two constitutions. For example, official use of the majority language, whether English or French, might be constitutionally required, or official use of the minority language, whether French or English, might be constitutionally prohibited. Similar provisions might be enacted concerning the language of education, considering the history of comparable educational issues in Canada. Since such provisions would obviously violate the spirit of similar international covenants on minority rights,[43] it is to be hoped that this might dissuade both countries from such explicit expressions of any mutual animosity.

If there were complete independence between Canada and Quebec, the provision of any positive constitutional protection for minority groups might have to await much wider international support of minority rights. While some progress towards this international goal has been made in recent years, particularly in the field of education because of its relation to culture, the world is still a long way from seeing on paper a recognition of the rights that anglophone and francophone minorities in Canada already enjoy. Moreover progress towards the effective international enforcement of those rights that do exist is significantly less than the recognition accorded them on paper.

On the other hand, it is possible that at least at the level of ordinary legislation, if not at the constitutional level, the still-evolving human rights laws of Canada might be extended to encompass language rights. The former provisions might be better adapted, in any event, to the day-to-day problems of Canada's linguistic minorities since constitutional provisions may tend to deal with symbols rather than with practical concerns. Moreover the debate over language rights at the constitutional level may actually impede attempts to deal with language issues under human rights legislation. In the long run the prospects of linguistic minorities under complete separation would depend on the humanity of their fellow citizens rather than on the constitution. In fact, this is the reality under any constitutional structure.

Conclusion

The specific impact on language and language rights in Canada of the various constitutional options would depend, not only on the particular constitutional option chosen, but also on the way in which that option is chosen, as well as on other factors. Policy choices relating to culture and language are implicit in changing the Canadian Constitution to any one of the possible options, be it increased provincial power, special status, sovereignty-association, or Quebec independence. These choices suggest a scale of recognition of minority-language rights that declines from one option to another in the order in which I have listed them. The major reason for the declining importance given to minority-language rights would be the gradual reduction in the concern shown for minority-language groups by the federal government, or by the separate national governments, if Quebec achieves sovereignty. As this concern is reduced, the ability of each minority group to elicit a response from its government would be reduced, and each group would be left more and more to its own devices.

Against this outcome, of course, must be set the increased opportunity for the linguistic majorities in Quebec and in the rest of Canada to achieve their cultural objectives unhampered by demands for equivalent attention from the minority group. The balance of advantages, however, is too uncertain for any rational choice to be made with confidence. In the final analysis this leaves the question very much open to a choice governed by emotion rather than by logic. There is every likelihood that this is the basis on which the choice will ultimately be made.

Notes

1. Canada, Royal Commission on Bilingualism and Biculturalism, *Report* (Ottawa: Queen's Printer, 1969).
2. Official Languages Act, R.S.C. 1970, c. O–2.
3. Official Languages of New Brunswick Act, R.S.N.B. 1973, c. O–1.
4. The Judicature Act, R.S.O. 1980, c. 223, s. 130.
5. Charte de la langue française, L.R.Q. 1977, c. C–11.
6. Ontario, Department of Education, Circular of Instructions No. 17 (1912).
7. In Manitoba the abolition of public support to separate schools under The Public Schools Act, S.M. 1890, c. 38, s. 179, discouraged continuation of French-language education that had been provided by the separate school system. Federal pressure led to restoration of French-language instruction by An Act to amend "The Public Schools Act," S.M. 1897, c. 26, s. 10, but this was

removed under An Act to further amend "The Public Schools Act," S.M. 1916, c. 88, s. 1.

8. Act to promote the French language in Quebec, S.Q. 1969, c. 9, ss. 1–2.

9. Charte de la langue française, ss. 72–86.

10. Canada, Parliament, House of Commons, *Constitutional Act, 1981: Resolution Concerning the Constitution of Canada (1981)*, Schedule B, Canadian Charter of Rights and Freedoms. Hereinafter cited as 'Charter'.

11. The British North America Act, 1867, 30 & 31 Victoria (U.K.), c. 3, s. 133; Manitoba Act, S.C. 1870, c. 3, s. 23 (R.S.C. 1970, Appendix 2).

12. An Act to Provide that the English Language Shall Be the Official Language of the Province of Manitoba, S.M. 1890, c. 14 (R.S.M. 1970, c. 010).

13. *Forest* v. *Attorney-General of Manitoba* (1980) 30 N.R. 213; (1980) 101 D.L.R. (3d) 385 (S.C.C.)

14. Charte de la langue française, ss. 7–13.

15. *Blaikie* v. *Attorney-General of Quebec* (1980) 30 N.R. 213; (1980) 101 D.L.R. (3d) 385 (S.C.C.)

16. These arguments are based on provisions of the Northwest Territories Act, R.S.C. 1886, c. 50, s. 110, as amended by S.C. 1891, c. 22, s. 18, which were continued in effect by the Alberta Act, S.C. 1905, c. 3, s. 16 and the Saskatchewan Act, S.C. 1905, c. 42, s. 16. The original enactment was exactly equivalent to section 133 of the British North America (BNA) Act and section 23 of the Manitoba Act. The 1890 amendment limited this provision somewhat, but the effect of that limitation is doubtful in light of *Blaikie* v. *Attorney-General of Quebec* (see note 15). The amendment dealt with the Legislature of the Northwest Territories, which then included Alberta and Saskatchewan. The Legislature was a delegate of Parliament at the time. According to the *Blaikie* case, section 133 of the BNA Act applies to delegated legislation. Thus the limitation introduced by Parliament in 1890, which was interpreted as authorizing the Northwest Territories' Legislature to abolish the use of French in its enactments, might not constitutionally give any such authority.

The application of section 133 to delegated legislation was reconsidered in *Blaikie* v. *Attorney-General of Quebec* (No. 2) (1981), 36 N.R. 120 (S.C.C.) The Court held that it applied to regulations by the government or a Minister or group of Ministers, regulations by other agencies subject to approval by the government or a Minister or group of Ministers prior to coming into force, and the rules of the courts and all quasi-judicial agencies. However, it did not apply to by-laws of municipal or school bodies, even those requiring prior approval by the government or a Minister or group of Ministers, or to regulations of other agencies that were not subject to such prior approval, even though such regulations might be subject to later disallowance by the government or a Minister or group of Ministers.

The attention of the Court was not directed to the status of the territorial Legislatures. This leaves open the question whether they should be compared to municipal bodies that are viewed as distinct from the government agencies subject to section 133, to other agencies where subjection to section 133 depends on whether the agency's regulations require prior government approval — since territorial legislation was subject to disallowance, but not prior approval (Northwest Territories Act, s. 17), the result in either case would be the same — or by analogy to the position of quasi-judicial tribunals. The subjection of quasi-judicial tribunals to section 133 is based on their effectively assuming the judicial role of the courts. Since the territorial Legislatures effectively assumed the role of Parliament in those matters delegated to them, this analogy is not as far-fetched as it might seem.

17. Charter, ss. 21–22.

18. *Ibid.*, ss. 17–19.

19. Official Languages Act; Official Languages of New Brunswick Act.

20. Charter, ss. 16, 20. The right to service in either language is absolute in the case of New Brunswick (s. 20[2]), but at the federal level it applies only to central offices and to other offices where there is a "significant demand" or where bilingual services are reasonable "due to the nature of the office" (s. 20[1]).

21. The British North America Act, 1867, s. 93; Manitoba Act, s. 22. With respect to the removal of this protection, see notes 6 and 7 above.

22. The Quebec government first moved to restrict availability of English-language education under the Official Languages Act, S.Q. 1974, c. 6, ss. 40–43, although, ironically, the precedent for provincial interference with the freedom of denominational schools to determine their language of education was set by the Act to promote the French language in Quebec (see note 8, s. 2). While this statute did interfere somewhat with English-language education by requiring that students be taught a working knowledge of French, it also interfered substantially with denominational school control over language of instruction by guaranteeing that individual parents, not the school board, could choose the basic language of instruction.

23. *Ottawa Separate School Trustees* v. *MacKell*, [1917] A.C. 62 (P.C.); *Le Bureau Métropolitain des Écoles Protestantes de Montréal* v. *Ministre de l'Éducation du Québec*, [1976] C.S. 430.

24. See *Brophy* v. *Attorney-General of Manitoba*, [1895] A.C. 202 (P.C.)

25. Charter, s. 23.

26. Charte de la langue française, s. 73.

27. Task Force on Canadian Unity, *A Future Together* (Ottawa: Minister of Supply and Services Canada, 1979), pp. 51–53.

28. Although it is conceivable that a proposal to increase federal power might be adopted through the amendment procedure in the charter (s. 37), the requirement of support by at least two thirds of the provinces makes any reduction of provincial power unlikely. An increase of provincial power is far more likely because, although the federal government also has a veto, a decision of only one federal government is necessary to accede to provincial demands, while seven provinces must agree to accede to federal demands.

29. Charter, ss. 16–23.

30. *Ibid.*, s. 23.

31. Canada, Constitutional Conference, Victoria, 1971, *Canadian Constitutional Charter*, Arts. 10–18; Canada, Prime Minister's Office, *Draft Proclamation*, 1976, Arts. 30–37; Canada, Parliament, House of Commons, Bill C–60 (1978), ss. 13–21.

32. Charter, ss. 16(1), 17(1), 18(1), 19(1), 20(1).

33. *Ibid.*, ss. 16(2), 17(2), 18(2), 19(2), 20(2), 23.

34. Canada, Parliament, House of Commons, *Constitution Act, 1980: Proposed Resolution Concerning the Constitution of Canda (1980)*, Schedule B, s. 23.

35. See, for example, François-Albert Angers, *Les droits du français au Québec* (Montréal; Éditions du jour, 1971), pp. 134–37.

36. Charter, ss. 16(1), 17(1), 18(1), 19(1), 20(1).

37. Manitoba Act, s. 23.

38. The British North America Act, 1867, s. 133.

39. Bill C–60, s. 131(4)(d) would have repealed s. 23 of the Manitoba Act upon the coming into force of Bill C–60's Charter of Rights. While that charter itself would have established the equivalent rights at the federal level and in Quebec and enacted the same language rights at the provincial level in New Brunswick and Ontario (ss. 13–16), such rights would have been eliminated in Manitoba. Of course, during 1978, the question of whether those rights still existed in Manitoba was before the courts. The subsequent reinforcement of those rights by the Supreme Court of Canada in *Forest* v. *Attorney-General of Manitoba* (see note 13), may make it more difficult for the federal government to contemplate their elimination.

40. Charter, s. 23.

41. United Nations, *International Covenant on Civil and Political Rights* (1966), Art. 27.

42. For example, the provisions of the Victoria Charter (see note 31) gave full status to French at the provincial level in Newfoundland, but not in Ontario, while Bill C–60 gave full status to French at the provincial level in Ontario, but not in Newfoundland. At the time of the former proposal, the Newfoundland government was politically friendly to the federal government, but the government in Ontario was not; at the time of the latter proposal, the Newfoundland government was no longer politically friendly to the federal government, and the Ontario government, although still unfriendly, was in a minority position, faced, in part, by an opposition party that was friendly to the federal government and was advocating official bilingualism. Under the circumstances, the provisions of the federal documents seem more than coincidence.

43. *International Covenant on Civil and Political Rights*, Art. 27.

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The Financial Framework of Income Distribution and Social Services

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The Financial Framework of Income Distribution and Social Services

The Scope of Income Distribution and Social Services

By their inherent nature the taxing, spending, and borrowing activities of government affect the distribution of income among individuals. Canadian social services supported by these activities comprise a broad range of programs in the areas of health (notably hospital insurance and medicare), education (notably the financing of educational institutions of all kinds and the provision of counselling, job-training, and placement services), and welfare (notably unemployment insurance, old age and survivor pensions, demogrants such as family allowances, income-maintenance programs for the chronically unemployed and the unemployable, and clinical social services of all kinds).

Given that all the financial activities of government affect income distribution, an essay that undertakes to address this subject in the context of federal constitutional options could be expected to touch on all the aspects of 'federal finance' or 'fiscal federalism' including tax jurisdiction and collection arrangements, transfers to individuals and governments, and the co-ordination of government debt-management and economic policy. It could be expected, as well, to consider many related activities whose financial impact vitally affects income distribution: for example, tax 'expenditures', government purchases of goods and services, capital expenditures on items such as housing, public transit, and urban renewal, and regional development programs. Then, since the essay also focuses on social services, it could be expected to range into any of a number of programs that occupy the penumbra of health, education, and welfare: for example, research, job-creation programs, student assistance, public housing, and veterans' benefits.

In fact this essay treats the financial framework of income distribution and social services selectively, rather than exhaustively. In particular it does not examine the question of jurisdiction over taxation. When it examines the federal constitutional options, it will assume that most taxes are a matter of concurrent jurisdiction and are therefore constitutionally available to both levels of government. This is actually so in the present Canadian federation. Indeed many recent suggestions for constitutional reform focus on the need to repair the damage allegedly wrought on the degree of jurisdictional concurrency in taxation by the decision of the Supreme Court in *CIGOL* v. *Saskatchewan* (1977).[1] Just as this essay assumes that any federal constitutional option will provide jurisdictional concurrency in most kinds of taxation, it also assumes that any such option will be broadly permissive about the constitutional right of both levels of government to co-ordinate their economic and debt-management policies. Finally, concerning the division of jurisdiction, this essay assumes that a constitutionally expanded role for the Government of Canada is, in the prevailing political climate, a classic 'non-starter', at least in the field of social services. With the sole exception of unemployment insurance, the existing division of jurisdiction in matters of health, education, and welfare is overwhelmingly in favour of the provinces, whether by way of exclusivity (sections 92 and 93 of the British North America [BNA] Act) or concurrency with apparent, though unconfirmed, provincial paramountcy (section 94A). This essay assumes, with due allowance for certain possibilities that might be permissible under asymmetric forms of federalism,[2] that the current provisions of the BNA Act represent the minimum degree of jurisdictional decentralization in the realm of social services that is politically tolerable within the Canadian federation.

Such an assumption concerning the division of jurisdiction is, of course, debatable. But we would argue that in any event the precise division of jurisdiction in matters of health, education, and welfare is of decidedly secondary importance. Far more important are the nature and content of the spending power of the central government. In all of the debates over income distribution and social services that have taken place in Canada, the spending power of the federal government has been front and centre. It is that spending power that constitutes the primary focus of this essay.

The Federal Spending Power

The federal spending power rests in part on the Crown prerogative. The Queen may bestow largess on such of her subjects and pursuant to such conditions as she may choose from time to time. More specifically, the constitutional scope of the federal spending power is grounded in two sections of the BNA Act: section 91(3) "The Raising of Money by any Mode or System of Taxation" and section 91(1A) "The Public Debt and Property." These two sections have come to mean that the federal government, having applied its unlimited taxing powers to the raising of revenue which then becomes public property, can dispose of that property in any manner it chooses, even though the object served comes under provincial legislative authority.

Judicial *obiter dicta*,[3] notably those of the Judicial Committee of the Privy Council (JCPC) in the *Employment and Social Insurance Act Reference* (1937), have been taken as qualifying the federal spending power in two respects. First, certain levies on employers and employees could be considered premiums rather than taxes and might accordingly fall outside federal jurisdiction either because they are akin to insurance premiums or because they regulate the employment contract. Secondly, if 'premiums', or for that matter taxes, were paid into an earmarked fund distinct from the Consolidated Revenue Fund, they might not be deemed to constitute the 'Public Property' encompassed by section 91(1A).

These *obiter dicta* have been taken seriously — so seriously, in fact, that they account in large measure for the only three formal amendments that have altered the federal-provincial division of jurisdiction originally enacted in 1867. The first added section (2A), unemployment insurance, to the list of federal responsibilities in section 91 of the BNA Act.[4] The second created section 94A, whereby old age pensions became an area of concurrent federal-provincial jurisdiction with the proviso that "no law made by the Parliament of Canada in relation to old age pensions shall affect the operation of any law present or future of a Provincial Legislature in relation to old age pensions."[5] The third expanded section 94A by adding to old age pensions, subject to the same proviso, "supplementary benefits, including survivors' and disability benefits irrespective of age."[6]

The negotiation of these three amendments to the BNA Act reinforced by usage the validity of the judicial *obiter dicta* concerning limitations on the federal spending power. In the process the abundant scope of the remaining federal spending power emerged clearly. Monies raised by federal taxation can be spent from the Consolidated Revenue Fund for any purpose and under any conditions that the federal Parliament approves. Such monies can be disbursed in the form of federal grants, conditional or unconditional, to individuals, institutions, or provincial governments. The grants can serve any object, including those that fall under the legislative jurisdiction of the province.

The constitutionally unlimited scope of the federal power to spend tax monies from the Consolidated Revenue Fund has proved to be the single most dynamic element of Canadian federalism. It has shaped the nature of the federation and has provided the focus for many of the most significant debates over its past, present, and future. The manner in which the spending power has been applied in different ways at different times has been a source of centralization and decentralization, of symmetry and asymmetry, of unity and disunity in Canadian federalism — all of these without ever altering so much as a comma in the text of the BNA Act. In the process the spending power has made nonsense of the allegedly 'water-tight' compartments into which the BNA Act divides federal and provincial jurisdiction. 'Water-tight' compartments are not 'money-tight'.

Centralization and decentralization

To the extent that the spending power has enabled the federal government to play a major role in the development of the welfare state, it has had a centralizing effect. The application of conditional grants to purposes ranging from vocational education to old age pensions induced the provinces to accord priority to programs that served federal objectives ranging from employment policy to income maintenance. Conditional grants, as in the case of old age pensions, have sometimes been a federal-provincial prelude to wholly federal programs that rest on the constitutionally sanctioned right of the central government to make payments to individuals as well as to provinces.

At the same time that the federal spending power has been a source of centralization, reactions to its application have checked and even reversed some of its centralizing tendencies. Federal payments to institutions under provincial jurisdiction offer an example. Constitutional though such payments may be, they have been severely curtailed in practice. The federal support payments to universities that were initiated in 1951 gave rise to a peculiarly Canadian version of the politics of interposition when the Government of Quebec ordered Quebec universities to refuse the grants. Interposition, the eminently American practice invoked in that country against the enforcement of court decisions, was invoked in Canada against the spending power. This power has indeed been the focal point of Canadian federalism.

Politics can effectively inhibit what the Constitution permits. The legacy of the university-grants episode has severely circumscribed the application of the federal spending power to universities, municipalities, and other institutions under provincial jurisdiction. For practical purposes the scope of the federal spending power has increasingly been limited to the making of payments to individuals and to provincial governments.[7]

Symmetry and asymmetry

With a few exceptions, of which the linguistic obligations imposed on the Legislature and courts of Quebec and Manitoba are the most important, the BNA Act is an eminently symmetrical Constitution. The spending power, however, has been a breeding ground of asymmetric federalism. The practice of contracting out or opting out enabled Quebec to withdraw from certain applications of the spending power and to receive a federally financed fiscal equivalent. The first instance of contracting out resolved the impasse over federal payments to universities in 1959 by according to Quebec an additional point on the corporation income tax. The value of this point was adjusted annually up or down to produce for the Quebec government the exact value of the university grants forgone. Beginning in 1964, a similar combination of tax points that applied to the personal, rather than the corporation, income tax and adjustment payments permitted Quebec to opt out of a number of conditional grant programs.

Asymmetric relations born of contracting out peaked in 1967. The successive dismantling of the university grants, the most important categorical conditional grants, and finally, in 1977, the major shared-cost transfers on behalf of hospital insurance, medicare, and post-secondary education, heralded a return to symmetric federalism. The spending power nonetheless retained its capacity to breed and to accommodate asymmetry; when the Government of Quebec refused in 1978 to make a temporary across-the-board reduction in its retail sales tax in return for federal compensation, the amount of this compensation was paid to the personal income-tax payers of the province.

Quite clearly the spending power has bred asymmetry in spite of a symmetrical Constitution. And the practice of contracting out or opting out is not the sole example. Through regional development expenditures the federal government has penetrated deeply into matters of provincial jurisdiction in certain provinces. It has done this to such a degree that one authority has speculated on the extent to which this penetration constitutes a denial of the right to equally responsible provincial governments in Canada.[8]

Unity and disunity

The controversies that have surrounded the application of the federal spending power have significantly detracted, at the political level, from the unity in the form of national standards that payments to institutions and conditional grants to provinces sought to achieve. Indeed the tortuous path from the politics of interposition in the university grants of the 1950s to the scuttling of the Victoria Charter in 1971 has, on balance, been a path of disunity, especially, if not entirely, between Quebec and English-speaking Canada. On the other hand, the application of the federal spending power has produced at least one uncontested triumph of national unity: the making of unconditional equalization payments to provinces with deficient fiscal resources.

For almost ninety years a constitutionally bred canon of conventional wisdom impeded explicit responses to the simple fact that interprovincial differences in income and wealth breed major disparities in the ability of provincial governments to provide similar levels and standards of public services. This canon of conventional wisdom held that the constitutional equality of provinces — symmetric federalism, if you will — was a barrier to on-going fiscal transfers paid in explicit recognition of fiscal capacity or need. By 1940 the Rowell-Sirois Commission had, in theory, strongly challenged this conventional wisdom; another seventeen years passed before the theory was translated into reality. Since 1957 a formal program of equalization payments that has come to encompass most provincial and local revenues has provided formula-calculated unconditional grants to provincial governments whose fiscal capacity is below the national average. The specific purpose of these grants is to bring an average level of public services supported by an average level of taxation within reach of all Canadians, whatever their province of residence.

The details of the equalization formula give rise to continuing differences among the federal government, the 'have' provinces, and the 'have-not' provinces. But the principle of equalization has come to enjoy unanimous support and, indeed, has passed into conventional wisdom. So solidly has this principle become established that a constitutional clause exhorting the virtues of equalization was among the few items on which First Ministers readily concurred in the federal-provincial conferences that led to the abortive Victoria Charter.[9] In recent years the leading advocates of Canadian constitutional reform have not only accorded like recognition to the importance of equalization, but have gone out of their way to stress the importance of an unfettered federal power to make unconditional equalization payments to the provinces. Thus, for example, the constitution envisaged by the Task Force on Canadian Unity explicitly excludes equalization payments from the legislative jurisdiction of the Council of the Federation.[10] The Beige Paper of the Quebec Liberal Party is careful to emphasize that its proposed Federal Council should have no more than an advisory role in the matter of equalization.[11] Finally, the principle of equalization has received explicit constitutional entrenchment in the Constitution Act of 1982.[12] Equalization is simultaneously embraced as a symbol of national unity and as the object of an unfettered federal spending power. Whatever else a directly elected federal Parliament may or may not do, it is expected to shoulder an explicit obligation to apply an unrestricted spending power to the making of unconditional equalization payments. Such payments are seen as the *sine qua non* of national unity; made by a nationally elected Parliament, they are portrayed as the ultimate testament to the existence of a Canadian community.

Income Distribution, Social Services, and Community

If equalization payments have come to be perceived as a hallmark of Canadian community, there may be grounds on which to hypothesize that the Canadian sense of community is gossamer thin. Before allowing this hypothesis to harden into a conclusion, however, it is wise to reflect on what 'community' may mean in the Canadian context, if only in order to limit expectations. Approached with a sense of proportion, the question of Canadian community may depend precisely on the extent to which the principle, if not the precise formula, of a fiscal device like equalization reflects a widely shared value.

What sense of community can realistically be expected to prevail in Canada? Canada is not a society grounded in any resounding sort of 'charter myth'.[13] One must search hard for anything like a metaphysical bond that transcends the individuals who comprise Canadian society. There is the land *a mari usque ad mare*. There is a shared history, but its unifying threads are frayed by Western alienation, Maritime resentment, and "two nations warring in the bosom of a single state." Dualism and regionalism are the long-standing adversaries of a sense of Canadian community.

The extent to which dualism and regionalism have become provincialized is deeply relevant to the evolution of Canadian federalism. This trend towards disunion is correctly emphasized in the report of the Task Force on Canadian Unity. Consider, for example, the emergence of a fully North Americanized francophone labour force in Quebec, representing a full range of professional and technical skills that it wishes to employ in French. The social and economic aspirations of the members of this modernized labour force quite naturally focus on the government in which French is the language of work, 'their' government, the Government of Quebec. This government becomes the initial show-case for the effectiveness of these skills in a French-language work setting; this same government is the logical source of 'affirmative action' to francisize the workplace in the private sector. Regulation, like taxing and spending, affects income distribution. Consider again the rise of an urbanized professional labour force in Alberta, induced by the economic transformation wrought by oil and gas. The government of this province is viewed increasingly by the members of the labour force, not only as the means of capturing the economic rent from 'their' natural resources, but as an engine for 'affirmative action' to diversify their economy against the day when these non-renewable resources will have been depleted. Consider even the so-called 'linchpin' of Confederation, Ontario, long the home of the largest and most affluent segment of the Canadian labour force. As Ontarians discover that their economy is increasingly threatened by world-wide shifts in the domains of energy and international trade, do they not look to the Government of Ontario as the last means of defending 'their' affluence?

As dualist and regional aspirations become provincialized, so are they made increasingly explicit by provincial governments. Meantime complementary forces are at work. Provincial government services tend to become "industries in which we find a sordid, or at least ignoble, preoccupation with the protection of their interests by some of the 'professionals' responsible for providing those services."[14] Such 'sordid' preoccupations are readily observable among the 'professionals' responsible for federal programs as well. The stage is set for the characterization of Canada as a collection of "governmentalized societies, both federal and provincial, interwoven with each other in relations of competitive interdependence."[15] The writer goes as far as to suggest that governments can be viewed as independent variables inducing rather than reflecting the socio-economic forces that have been provincializing dualism and regionalism in Canada. It is not necessary to debate the merit of this view in order to appreciate the challenges that beset a Canadian sense of community.

Northrop Frye and Marcel Rioux, among others, remind us of an old distinction between a *Gemeinschaft* and a *Gesellschaft*, that is, between a community and a political federation.[16] A similar distinction has been made between 'unmixed' or 'intensive', as distinct from 'extensive', republics or, better still, communities.[17] Federalism can be viewed as a process as well as a form of government. In the former sense federalism is the dynamic process whereby intensive communities evolve closer or more distant patterns of living together.[18] The strength or weakness of the bonds of this living together is ever changing and fluctuating over time. The socio-economic forces that in recent years have provincialized regionalism and dualism have strengthened sentiments of intensive community and sapped feelings of extensive community, and they have done this in a setting where government has become a more salient factor in both intensive and extensive communities.

It is not easy and, for that matter, it may be misleading to try to disentangle the governmental influences from the social and economic forces that determine the extensive community and its component intensive communities. When political leaders demand constitutional change, to what extent are they responding to the socio-economic forces that have made the intensive communities more important? Or are they simply crying out for deliverance from their own condition of competitive interdependence?

There is no clear-cut answer to these questions. But it can be said that as sentiments of intensive community have waxed and those of extensive community have waned, provincial political leaders have responded to demands for patterns of income distribution that reflect voter preferences that differ from province to province. This has placed considerable pressure on federal spending programs, particularly those that involve payments to individuals. It has also multiplied provincial surtax and credit schemes that have complicated, and indeed challenged, federal-provincial tax-collection agreements. Meanwhile debates over responsibility for social services, while they may well respond to socio-economic factors, are fuelled at least as much by bureaucratic ambitions within government.

Given that the sense of extensive community in Canada sustains to a lesser degree than it did in the past common patterns of income distribution and common standards of social services, continuing adherence to the principle of equalization may be, if nothing else, the last tangible bastion of a sense of extensive community. Given that unconditional equalization payments continue to be accepted because they make it possible to bring average levels of public services within the reach of all Canadians, whatever their province of residence, these payments testify to the continuing existence of social, economic and, for that matter, moral bonds among the citizens of the extensive community. If these same payments, precisely because they are directed in the first instance to provincial *governments*, happen to be sustained by the unspoken ties that link political leaders and transcend their individual govermental ambitions, then whatever role governments may themselves play in undermining a sense of extensive community is diminished. On the other hand, precisely because equalization involves payments to governments, it has the effect of securing the ability of provincial governments to respond to the demands of their citizens, and thereby promotes provincial autonomy. Thus equalization payments may at once promote a sense of both extensive and intensive community.

Can a sense of extensive community that is strong enough to sustain equalization payments survive under options that range from symmetric federalism through asymmetric federalism to sovereignty-association and independence for Quebec? As far as this question pertains to independence, the answer is obviously 'No', for equalization payments are not to be confused with foreign aid. Concerning symmetric and asymmetric federalism, on the other hand, the answer probably hinges far more on what has been called 'constitutional morality'[19] than on constitutional form. Sovereignty-association, for its part, poses a profound conundrum that demands reflection. But before we consider these options, it is essential to examine the nature and extent of the current financial framework of income distribution and social services.

The Current Financial Framework

The Interrelations among Taxes, Transfers, and Spending Responsibilities

The pursuit of social welfare objectives within a federal division of power in a country as extensive and diverse as Canada has placed a premium on imagination and flexibility in both policy formation and constitutional adaptation. Only rarely has a Canadian government, federal or provincial, simultaneously possessed the constitutional jurisdiction, fiscal resources, and program design that matched its contemporary priorities for income distribution and social services. It is both the genius of Canadian federalism and the cause of much of its complexity that so many mechanisms have been developed to overcome these discontinuities.

Once government has settled on a particular policy objective, it frequently faces the choice between two broad approaches: the use of taxes, transfers, or both to increase the income of some persons and reduce that of others; or the direct provision of services whereby government itself provides what some persons would otherwise be unable to enjoy because of inadequate incomes. The latter course redistributes real income to the extent that some persons receive public services exceeding the value of the taxes they pay. The former course equalizes access to both public and private goods and services to the extent that the means to purchase them is equalized.

This is a choice that only begins our consideration of the current financial framework of income distribution and social services in Canada. The first complication enters with the recognition that the objective of a particular pattern of income distribution may be pursued on either the taxing or spending side of fiscal policy or on both sides simultaneously. That is, income may be redistributed by making payments to classes of persons in excess of the taxes exacted from them, or by reducing the taxes that would otherwise be demanded of them. The latter method, of course, has an effect similar to collecting higher taxes from everyone and returning a portion to some. This similarity has come to be underscored by referring to differential tax exemptions or credits as 'tax expenditures', a category of fiscal instrument we shall encounter again shortly.

In our present Canadian federation not one, but two, levels of government are involved in income distribution and social services. What are the consequences of a scheme in which the power to tax and the authority to spend are shared betweeen two orders of government? One answer we know with certainty: every aspect of governmental administration becomes more complex. Other more substantive consequences emerge, as well, and add wholly new territory to the policy choices mentioned above. One consequence is that comparisons between the level of social services and per capita income in one constituent unit (province) and another become not only possible, but important. From such comparisons arise issues of equity and equalization, not just among individuals and classes of individuals, but also among provinces. And from such issues emerge schemes for the transfer of revenues from one order of government to the other.

Canadian federalism has taken the complications a major step further. Not only are provincial revenues partly subject to federal priorities relating to the nature and amount of transfer payments, but because of joint tax-collection arrangements, provincial choices in terms of their own taxation policies — including their capacity to undertake tax expenditures — can be limited by the structure of federal taxation. This restriction applies only to the extent that provinces choose to have a tax collected by the federal government, a choice made only for income taxes and only by some provinces. (Ontario and Alberta collect their own corporate income tax, and Quebec collects both personal and corporate income taxes.) At that, the extent of this restriction is determined by the content of the tax-collection arrangements negotiated between the federal government and the provinces. Because these arrangements have come to accommodate various provincial surtaxes and credits, they have resulted in an enhanced role for all provinces in income distribution.

The interdependence of federal and provincial income-tax policy is a reality of current Canadian federalism, and given the relative importance of income taxes in Canadian public finance and especially in fiscal policies affecting income distribution and social welfare, we find ourselves confronting a deeply interconnected system of taxes, intergovernmental and interpersonal fiscal transfers, and spending responsibilities. This interconnection runs so deep that it has the potential to neutralize any change in the division of jurisdiction or in the scope of the federal spending power. Consider the fact that a child-tax-credit scheme can be a substitute for a family-allowance scheme. This means that exclusive provincial jurisdiction over family allowances would not terminate federal capacity to use taxation in order to redistribute income in favour of families with children. Before we can contemplate the impact of alternative constitutional arrangements on the capacity of Canadian governments to redistribute income and provide social services, we must seek some greater clarity in the major components of this complex system. These components will be described under six main headings: unconditional transfers to provinces; federal payments to individuals; federal programs with provincial participation; shared-cost programs; the Canada and Quebec Pension Plans; and tax-expenditure programs.

Unconditional Transfers

The federal government transferred nearly $10 billion to the provinces in 1977–78 under seven significant unconditional grant programs. Each of these programs deserves brief mention, for each is quite distinct and makes its unique contribution to the structure of Canadian fiscal federalism. The amounts represented by each program for each province are summarized in Table 1.

Statutory subsidies

The oldest, and indeed the original, federal-provincial, unconditional fiscal transfer arrangements have come to be known

Table 1: *Unconditional Payments from Federal to Provincial Governments, 1977 – 1978*[a]

	($millions)										
	Nfld.	*P.E.I.*	*N.S.*	*N.B.*	*Que.*	*Ont.*	*Man.*	*Sask.*	*Alta.*	*B.C.*	*Total*
Equalization	286.0	65.0	353.0	287.0	1 265.0		205.0	30.0			2 491.0
Established Programs[b]	159.0	32.8	243.3	193.6	1 954.9	2 523.8	302.8	269.4	577.4	711.6	6 968.6
Statutory Subsidies	9.7	.7	2.2	1.8	4.5	5.5	2.2	2.1	3.4	2.1	34.2
1971 Undistributed Corp. Income[c]	.1		.4	.2	5.5	6.7	.6	.4	1.1	1.9	16.9
Public Utilities Tax Transfer	2.1				.2	8.1	1.2		31.9	.5	44.0
Grants in Lieu of Taxes[d]	1.0	.7	7.2	4.7	16.9	53.6	7.9	3.1	7.0	11.6	113.7
Contracting-out					288.7[e]						288.7
TOTAL	457.9	99.2	606.1	487.3	3 535.7	2 597.7	519.7	305.0	620.8	727.7	9 957.1

Notes:

a. F.P.R.O., *Federal-Provincial Programs and Activities, 1978*.
b. Includes equalized portion of E.P.F. tax transfer.
c. Repealed as of 31 December 1978.
d. Includes grants to municipalities.
e. Welfare and youth allowances only; other programs included in E.P.F. Includes $13.1 million payment in lieu of Canada Student Loans Program.

collectively as 'the statutory subsidies'. Although they now total less than 1 per cent of federal unconditional payments to the provinces, they once represented the mainstay of provincial revenues and the virtual glue of a shaky Confederation. The statutory subsidies include payments calculated on a per capita basis, payments to support provincial governments, interest on per capita debt allowances, and special grants for several provinces negotiated variously when each province was created, was admitted to Confederation, or threatened to leave. Newfoundland, including its special grant of $9.1 million pursuant to Term 19 of the Terms of Union, received $9.7 million, the largest statutory transfer of all provinces. The other provinces received amounts ranging from less than $700 000 for Prince Edward Island to $5.5 million for Ontario. The payments are completely unconditional.

The public utilities income-tax transfer

The unconditional public utilities income-tax transfer simply attempts to neutralize the fiscal consequences for the provinces of reliance on publicly owned utilities whose profits accrue to the owning provinces and are not taxed by the federal government, as distinct from privately owned utilities whose profits are taxed by the federal government. This program returns 95 per cent of federal income taxes derived from privately owned utilities to the provinces in which the utilities are located. In 1977–78, $44 million was paid out, 72.5 per cent of it to Alberta.

Grants in lieu of taxes

These grants derive from the same constitutional rule as the public utility-tax transfers: that is, that one level of government may not tax the property of another (section 125 of the BNA Act). Unconditional grants in lieu of taxes represent payments to (three) provincial governments and to municipalities (in all provinces), representing provincial and municipal property taxes that would have been levied on federal property had it been privately owned. The federal government makes some deductions for local services that it provides directly to its own property — some police protection and educational programs, for example — but otherwise pays amounts similar to the taxes that would otherwise have been collected. In 1977–78, $113.7 million was transferred, 47 per cent of that sum to municipalities in Ontario; this percentage reflects the disproportionate physical presence of the federal government within that province.

Undistributed corporate income of 1971

The transfers relating to taxes on 1971 undistributed income were made as part of the transition to the new Income Tax Act in 1972. This arrangement yielded a modest $17 million for all provinces in 1977–78. (Seventy-two per cent of that sum went to Ontario and Quebec.) The arrangement was terminated in 1977, though some final payments extended to 1981.

Equalization payments

Canada's unconditional equalization scheme of payments to the provinces is the result of a lengthy historical process whose roots lie in the 1941 tax-rental agreements. It made its first appearance in 1957 and came to full flower in 1967. The scheme has been re-established with minor changes through a series of five-year agreements or 'fiscal arrangements' beginning with the period 1967–72 and extending to the current arrangements that cover the fiscal years 1977–82. The payments are based on a scheme often referred to as a 'representative tax system' or 'revenue-equalization approach'. Essentially a representative per capita yield is calculated for each province for each of the twenty-nine revenue categories or taxes included in the scheme. Each representative per capita yield is a hypothetical amount equal to the average per capita yield of the given revenue source for all provinces combined. For each revenue source, each province is assigned a positive or negative entitlement that is the amount by which the per capita yield of the revenue source in that province falls below or exceeds the average for all provinces (the 'representative yield'). These positive and negative per capita values are totalled, and if the sum is positive, the amount is multiplied by the provincial population to yield an entitlement that is paid as an unconditional grant to the provincial government concerned. All provinces except British Columbia, Alberta, and Ontario received equalization grants in 1977–78. Federal payments to the seven recipient provinces in that year totalled $2.5 billion; 51 per cent of this amount went to Quebec, and 40 per cent went to the four Atlantic provinces.

As already noted, acceptance of the principle that underlies equalization payments is widely hailed as a tangible symbol of Canadian unity. But this is not to say that the current equalization formula is free of limitations. The formula stops substantially short of full equalization since a fiscally affluent province with a consequently large negative entitlement receives, not a negative grant, but simply a zero grant. Meantime the formula does not attempt to achieve equalization beyond the average representative revenue yield. Remaining interprovincial fiscal disparities are further compounded by the fact that local government revenues are included only to the extent that they involve taxes levied to support elementary and secondary education. Even more arresting are the limitations that have come to light with the contemporary situation relating to energy. These limitations call into question the continued existence of the representative tax-yield formula.

Changes in energy pricing create an enormous revenue windfall for Alberta and, to a lesser extent, for Saskatchewan and British Columbia. In the other provinces the revenue base from oil and gas is zero. But the inclusion of oil and gas revenues in the representative tax-yield formula confers large per capita entitlements on all the other provinces. The entitlements are so large that they can even wipe out an otherwise negative total entitlement. Thus Ontario, whose personal income per capita is second only to that of British Columbia, had a positive entitlement by 1980–81 that would generate an equalization grant of $250 million. Legislative expedients have so far prevented the payment of this money.

Of central concern to the federal-provincial negotiations that will produce the formal equalization arrangements for the 1982–87 quinquennium is the fact that the current revenue-equalization formula has been inflating provincial equalization entitlements to the point where the growth of equalization grants has simultaneously lost any relation to the increase in the cost of providing average public services and outstripped the ability of the federal government to make the grants from its revenues. This is because payments to any province are determined ultimately by per capita revenues generated in the other provinces. The key lesson that emerges from this situation may well be that any constitutional option, however resoundingly it may endorse equalization as a symbol of national unity, should respect and, if anything, enlarge the power of governments to negotiate from time to time the terms on which that option is to be implemented.

Established Programs Financing

The Established Programs Financing arrangement represents the major intergovernmental fiscal innovation of the 1970s. It also represents the latest response to the pressure from provincial governments for fewer federal intrusions into areas of provincial jurisdiction and for greater provincial fiscal discretion in meeting their spending responsibilities. Some of the transitional and stabilizing features of this scheme are extraordinarily complex, but the basic features are quite simple.

In essence federal payments to the provinces under three major and well established shared-cost programs were transformed in 1977 into a two-part, unconditional, fiscal arrangement. The three programs were those supporting hospital insurance, medicare and extended health-care services, and post-secondary education. The first of the new two-part fiscal arrangements provides for unconditional cash transfers equal to 50 per cent of the average per capita federal payments in 1975–76, plus $20 per capita, increased annually with the Gross National Product (G.N.P.), for extended health-care services. The second part involves reduced federal tax rates (allowing the same increase in provincial taxes without any over-all increase) equal to 13.5 per cent of the federal personal income tax and 1 per cent of corporate income. Provincial revenues from the transfer of tax room are equalized to the national average per capita revenue, and transitional arrangements ensure that the tax transfer is at least equal to the cash payments.

As might be expected from the services involved in this arrangement, the Established Programs Financing represents a massive devolution of fiscal authority. In 1977–78 an amount of nearly $7 billion was transferred to the provinces through cash grants and increased tax room. This represented fully 70 per cent of all federal-provincial unconditional transfers.

Contracting-out

Contracting-out is the initially controversial device that allows Quebec to opt out of certain shared-cost programs without financial penalty. The significance of this device was substantially reduced with the introduction of Established Programs Financing. In 1977 the following situation was put in place. In Quebec the federal basic tax on personal income is 16.5 percentage points lower than it is in other provinces. The federal government recovers the dollar value of these 16.5 points by subtracting the cash equivalent of 8.5 points from Quebec's Established Programs Financing cash payments, five points from Canada Assistance Plan cash payments, and three points for the now defunct Youth Allowances program. In 1977–78 the dollar value of this contracting-out was $777.7 million. A new instance of contracting-out appeared in 1978 when Quebec refused to make a temporary across-the-board reduction in its retail-sales tax in return for federal compensation. The fiscal equivalent of the forgone compensation was paid directly to the personal income taxpayers of the province. It amounted to the lesser of federal tax payable or $85.

Federal Payments to Individuals

There are a large number of programs of the Government of Canada that directly or indirectly affect the distribution of income and the provision of social services. To some extent the definition of income distribution and social services as a category of public policy is arbitrary, and it is not always obvious that a particular program does or does not fall within the meaning of the definition. Expenditures on direct job-creation programs definitely contribute to the redistribution of income and represent a social service, but they could just as well be classed as expenditures on economic development. Indeed such expenditures almost certainly fall within both categories, and their inclusion here should not suggest any need to exclude them elsewhere.

Table 2 summarizes the most significant income-redistributive and social service payments from the federal government directly to individuals, but tallied by province. It is immediately apparent from this table that direct federal payments remain very large. Their total of just under $10 billion in 1977–78 is virtually the same as the total of unconditional transfers to the provinces. Recent moves in the direction of fiscal decentralization have still left in place an impressive infrastructure of federal programs and expenditures.

Payments under the Old Age Security Act

The largest single category of direct federal payments is made up of payments under the Old Age Security Act. These payments fall into three categories: old age pensions, the guaranteed income supplement, and spouses' allowances. The old age security payments are the current manifestation of a federal commitment dating from 1927 to provide all Canadians with a measure of income security after retirement age. Until 1952 pensions remained a provincial responsibility, and the participation of the federal government was limited to a conditional grant arrangement by which needy persons over seventy years of age could qualify for a pension jointly funded

Table 2: *Federal Expenditures under Wholly Federal Programs, by Province 1977–1978*[a]

	Nfld.	*P.E.I.*	*N.S.*	*N.B.*	*Que.*	*Ont.*	*Man.*	*Sask.*	*Alta.*	*B.C.*	*Total*
					($millions)						
Unemployment Insurance[b]	215.9	38.3	192.5	220.7	1 472.7	1 004.0	98.3	70.9	112.6	445.6	3 871.5
Old Age Security[c]	108.0	35.7	209.1	160.8	1 245.3	1 687.2	261.4	249.6	333.6	565.6	4 856.3
A.O.T. Allowances	7.7	1.8	9.3	7.5	48.5	59.1	8.9	6.5	16.1	18.7	184.1
Manpower Mobility	1.7	.1	1.2	.9	4.8	4.4	.5	.4	.5	2.4	16.9
Canada Student Loans	8.5	2.2	17.8	10.7	[e]	135.4	15.2	11.4	32.2	26.7	260.1
Job Creation[d]	38.0	7.3	23.5	27.7	118.4	53.0	13.3	11.0	10.2	35.6	338.0
Social Welfare for Indians (1976–77)	← 7.0 →				7.9	13.2	22.2	19.3	18.0	19.2	106.8
TOTAL	1353.9				2 897.6	2 956.3	419.8	369.1	523.2	1 113.8	9 633.7

Notes:

a. Canada, *Public Accounts, 1978*; Statistics Canada, *Social Security, 1978*; Canada Student Loans Program, *Annual Report 1977–78*.

b. Figures for calendar year 1977.

c. Includes basic pension, guaranteed income supplement, spouse's allowance.

d. Includes LEAP, New Horizons, Canada Works, Young Canada Works, etc

e. See Table 1, note e.

by the federal and provincial governments. When section 94A was added to the BNA Act, the federal government began in 1952 to make flat-rate pension payments to all Canadians who were seventy years of age or older. After 1966 the age requirement was progressively lowered until by 1970 pensions were provided to all those sixty-five years of age and older. The pension was initially a flat amount, increased periodically. It moved from $40 per month in 1952 to $75 in 1967. Between 1967 and 1973, several formulas were tried, tying increases in pension rates to various measures of inflation. Since 1973 the rate of pension has been increased every three months by the percentage increase of the Consumer Price Index (C.P.I.) In October 1977, the basic pension stood at $150.43 per month.

The Guaranteed Income Supplement was added to the pension scheme in 1967. It is an administratively complex arrangement by which an income considerably higher than the basic pension is assured. Persons must apply for the supplement, and the determination of both eligibility and amount of supplement is based on the individual's previous year's income as calculated for personal income-tax purposes. The amount of supplement is reduced if the applicant earns income additional to the basic pension, but the reduction is less than the amount of income and differs for pensioners and their spouses. The maximum level of guaranteed income is now also increased in line with the C.P.I. In October 1977 it stood at $255.94 ($150.43 basic and $105.51 supplementary) for single pensioners and $488.24 ($300.86 basic and $187.38 supplementary) for couples.

In 1975 the third element of the pension program was added in the form of spouses' allowances. This arrangement simply makes the payments under the basic and supplementary schemes available to the spouse of a pensioner if the spouse is between sixty and sixty-four years of age.

Nearly $5 billion was paid to Canadians by the federal government in the form of old age security payments in 1977–78. This represented fully 50 per cent of all direct federal payments to individuals included in Table 2. Federal funding of old age pensions has moved through an interesting series of changes. Prior to 1972 the federal government maintained a distinct fund known as the 'Old Age Security Fund'. Payments were made into the fund from earmarked taxes. In 1972 distinct taxation for pensions was abandoned, but the fund was maintained, and payments were made to it equal to the estimated proceeds of the discontinued taxes. In 1975 the special fund was abolished, and pensions are now paid to individuals from the Consolidated Revenue Fund of Canada. It is worth noting that under present funding arrangements, the constitutional basis of old age security payments is the general spending power, and section 94A of the BNA Act has become redundant. This section, however, remains enormously relevant to the Canada Pension Plan.[20]

Adult Occupational Training Allowances

These allowances are income-support payments made to individuals placed in a federally funded training course by a Canada Employment Centre counsellor. The purchase of training places is a distinct program operated in co-operation with the provinces, although the training allowances involve no provincial participation. In 1977–78 these allowance payments totalled $184.1 million.

Manpower Mobility grants

These grants are paid to individuals whose employment prospects would be improved through relocation. The payments cover several situations bearing on job-related mobility, including travel in search of employment and removal of a worker's family to a new location where employment has been found. This is a modest program that in 1977–78 involved the expenditure of only $16.9 million. The payments were, however, quite disproportionate by province. The four Atlantic provinces together contain 9.5 per cent of the Canadian population, yet residents of these provinces received 23 per cent of the mobility payments.

The Canada Student Loans Plan

This plan provides an interesting example of the federal government's indirect support of post-secondary education. Under the program, eligible post-secondary students may borrow funds from a commercial lender, and the federal government both guarantees the loan and pays the full interest charges for the whole period of studies. The student assumes responsibility for repaying the principal of the loan following graduation or withdrawal. The federal government thus assists both post-secondary students and institutions, whose enrolment the plan increases, but does so by means of payments only to chartered banks and other approved lenders. Provinces may, however, operate their own student-loan program and opt out of the federal scheme. Quebec has taken advantage of this option and receives a transfer of $13.1 million in lieu of direct federal payments. Ontario, too, runs its own student-assistance program, but has integrated its loan portion with the Canada Student Loans Plan. Federal expenditures under the plan in the provinces other than Quebec totalled $260.1 million in 1977–78.

Job-creation programs

Direct job-creation programs have been a part of Canada's economic and social policies since the depression of the 1930s. They have evolved through a wide array of administrative structures, intergovernmental arrangements, and program innovations. Municipal Winter Works, Opportunities for Youth, Local Initiatives Program: these and others have come and gone as governments have wrestled with the problems of seasonal, structural, and cyclical unemployment. Direct job creation is of particular significance in this paper for two reasons. First, because these programs seek to affirm the integrity of local communities, their emphasis is on the creation of jobs where unemployed people happen to be located, rather than on the relocation of people to places with greater job-creating potential. As a result, these programs have an obvious and deliberate interregional and interprovincial redistributive effect. The second significant factor is the troubled federal-provincial relationships that are the frequent consequence of these programs. Although federal expenditures serve the primary objective of immediate job creation, they are often seen as intensifying more enduring problems that the provinces are then left to solve. Similarly, the choice of projects for which jobs are created can all too easily be unrelated or even contradictory to provincial priorities for social and community development.

Despite their attendant problems, job-creation programs have an obvious appeal and have come to comprise a significant component of federal expenditures. In 1977–78 a total of $338 million was expended on four major programs: Local Employment Assistance, New Horizons, Canada Works, and Young Canada Works. The interprovincial redistribution of income is apparent from Table 2. Federal expenditures in Newfoundland represented an amount equal to $66.67 per capita. In Alberta the corresponding per capita expenditure was $5.23.

Indian Affairs

The federal government has constitutional responsibility for Native people and provides income-support and social-service programs to them at an annual cost in excess of $100 million. Few of these programs are unique; essentially they correspond to programs provided for other Canadians by the provinces. Increasingly the federal government has been purchasing services from provincial and local governments so that Native people need not be distinguishable as the special clients of the federal government.

Unemployment insurance

The history of unemployment insurance reflects much that is essentially Canadian. The original federal legislation of 1935 was struck down by the courts as unconstitutional, and it was not until the BNA Act had been amended to place unemployment insurance under exclusive federal jurisdiction that Canada finally established a national program in 1941. That program remained largely unchanged until 1971 when the first — and most far-reaching — of several recent modifications was enacted. In essence, the unemployment-insurance program offers insurance coverage to almost all working Canadians against the financial effects of loss of employment by continuing the recipient's income at approximately two thirds of the previous wage or salary level to a prescribed maximum of insurable earnings and for a prescribed maximum period of time.

Various features of the unemployment-insurance program, whose details are frequently revised, give an indication of its unique responsiveness to the facts of Canadian economic and social life. Although the plan was originally intended to operate so that benefit payments would be met from compulsory employer and employee contributions, the federal government has had increasing recourse to the Consolidated Revenue Fund to finance both seasonal benefits and benefit outlays brought about by cyclical spurts in the rate of unemployment. Secondly the plan has been *regionally* differentiated. Thus, for example, there have been regional differences in the qualifying period of employment before benefits may be claimed. The period of benefits has also been extended where regional unemployment is above average: currently two additional weeks of benefits are allowed for each half percentage point by which the regional unemployment rate exceeds 4 per cent to a maximum of thirty-two additional weeks. This extension is in addition to a shorter period of extended benefits allowed when the national rate of unemployment exceeds 4 per cent. Such extended benefits, expressed as shorter qualifying periods or longer benefit periods, have been provided from the Consolidated Revenue Fund.

As a result of the regional variations both in levels of unemployment and in unemployment-insurance benefits, the federal government makes quite disproportionate payments to different regions. Table 2 indicates the total amount paid out in benefits to residents of each province. The total is indeed massive: $3.9 billion in 1977–78, or 40 per cent of all federal payments to individuals. Of that $3.9 billion, $2.6 billion was financed by premiums paid by employers and employees, and $1.3 billion by payments from the Consolidated Revenue Fund. Table 3 shows, for each province in 1977, the total of premium receipts and benefit payments. Four provinces — Ontario, Manitoba, Saskatchewan, and Alberta — made a net contribution in that year, while the other six received benefits far in excess of premiums. The excess of benefits over premiums in Newfoundland represented 81 per cent of all benefits paid in that province and a contribution from the Consolidated Revenue Fund of $305 per capita. The comparable figures for Quebec were 55 per cent and $234 per capita.

Oil-import subsidy

There is a recent, wholly federal, expenditure program whose regionally differentiated impact is difficult to analyse, but undoubtedly immense. This program is one through which the federal government pays to oil-importing companies an amount equal to the difference between the intergovernmentally negotiated price of Canadian crude sold west of the Ottawa River and the higher (world) price of imported crude sold in Eastern Canada. Since the subsidy is paid directly to the oil importer, it is not possible to calculate the exact regional breakdown of the net benefits. Nearly $1 billion was spent under this program in 1977–78, all of it ensuring that Eastern Canadians enjoyed the benefits of the lower-than-market price set for Western crude as purchased by Canadians west of Quebec. This subsidy can be expected to decline annually to the extent that increases in the domestic price of oil or decreases in the world price bring the two closer together. For purposes of illustration, Table 4 breaks down into provincial segments the $924.8 million spent on

Table 3: *Unemployment Insurance Premiums and Benefits by Province, 1977*[a]

	($millions)										
	Nfld.	*P.E.I.*	*N.S.*	*N.B.*	*Que.*	*Ont.*	*Man.*	*Sask.*	*Alta.*	*B.C.*	*All Canada*[b]
Premiums	42.0	8.9	75.9	60.3	663.3	1 011.6	107.5	76.4	217.7	288.3	2 555.3
Benefits	215.9	38.3	192.5	220.7	1 472.7	1 004.0	98.3	70.9	112.6	445.6	3 885.0
Excess of Benefits over Premiums	173.9	29.4	116.6	160.4	809.4	−7.6	−9.2	−5.5	−105.1	157.3	1 329.7

Notes:

a. Employment and Immigration Commission.

b. Includes residents of Territories and persons outside Canada.

Table 4: *Imputed Provincial Allocation of Federal Oil Import Compensation Payments, 1977 – 1978*[a]

($millions)

Province	*Payment*[b]
Nfld.	$ 61.8
P.E.I.	13.3
N.S.	91.4
N.B.	75.5
Que.	682.8
	$924.8

Notes:

a. Canada, *Public Accounts, 1978*.

b. Payments were actually made directly to oil importers; imputed provincial allocation calculated on the basis of each province's share of the population of the five Eastern provinces.

oil-import subsidies in 1977–78. The provincial figures result from a calculation based on the simplistic, if not wholly unfounded, assumption that per capita consumption of oil is the same in each of the five Eastern provinces.

Federal Programs with Provincial Participation

The programs falling within this category all share the distinguishing characteristic that while they are federally funded, they make explicit provision for provincial participation. The major programs, with federal expenditures by province, are summarized in Table 5. By far the most costly of these programs is the scheme of family-allowance payments that involved some $2.1 billion of federal funds in 1977–78.

Family allowances

The family-allowance program was established in 1945 and remained basically the same until 1973. It was a wholly federal program under which payments were made in behalf of children under the age of sixteen. Initially the payments increased with the age of the child to a maximum of $8 per month, but were raised to a uniform $12 for all children in 1973. In the meantime a new program had been added in 1964, providing youth allowances of $10 per child per month for those sixteen and seventeen years of age who were in full-time attendance at an educational institution. (It was this program from which Quebec opted out.)

Table 5: *Federal Expenditures by Province on Programs with Provincial Participation by Legislation or Federal-Provincial Contract, 1977 – 1978*[a]

	Nfld.	*P.E.I.*	*N.S.*	*N.B.*	*Que.*	*Ont.*	*Man.*	*Sask.*	*Alta.*	*B.C.*	*Total*
	($millions)										
Family Allowances	65.1	11.9	79.0	68.7	567.2	740.4	93.9	89.4	184.1	214.7	2 114.4
A.O.T. (Institutional)[b]	13.2	2.9	13.4	11.5	99.7	85.0	11.6	9.8	24.0	28.9	300.0
A.O.T. (Industrial)	2.2	1.1	5.0	4.3	19.7	25.0	3.1	3.1	1.9	10.3	75.7
Employment Injury Benefits and Occupational Safety	.2	.1	5.9[c]	.4	4.6	4.8	.4	.9	1.4[d]	1.6	20.3
Home Insulation Program[e]	n/a	← 14.4 →		n/a	n/a	n/a	n/a	n/a	n/a	n/a	14.4
TOTAL	80.7	133.7		84.9	691.2	855.2	109.0	103.2	211.4	255.5	2 524.8

Notes:

a. Canada, *Public Accounts, 1978*; Statistics Canada, *Social Security, 1978*.
b. Payments to provincial governments.
c. Includes Cape Breton Development Corporation.
d. Includes Yukon and Northwest Territories.
e. Calendar year 1979.

In 1974 the youth- and family-allowance programs were combined into a largely new family-allowance program. Under the new program, the rate of allowances was increased to $20.00 per child per month for dependent children under the age of eighteen; this amount was to be indexed annually by reference to the C.P.I. (Indexing was abandoned in 1976, but subsequently reinstituted.) Two other significant changes were also incorporated into the new program. First, the payments became taxable income for purposes of personal income tax, but this tax increase was subsequently offset by a child tax credit that diminishes as combined family income increases. Secondly the new scheme made allowance for provincial variations in 'per child' rates. This is the element that entails provincial participation in the program. The amount by which a province may vary its rates is limited by federal law, but two provinces, Quebec and Alberta, have taken advantage of this option and have instituted two quite different variations. In Quebec the amount of the allowance increases with the number of children in a family; in Alberta the rate increases with the age of each child. In addition Quebec pays a provincial supplementary allowance that also increases with the number of children. (In 1977 the amounts, to be indexed annually, varied from $5.05 for a first child to $10.11 for a fourth or subsequent child.) Prince Edward Island also adds a provincial supplement of $10.00 for the fifth child and subsequent children in a family and has arranged for this supplement to be included in a single cheque issued by the federal government.

Adult Occupational Training

Adult Occupational Training (A.O.T.) involves two programs, each with unique provisions for provincial participation in otherwise wholly federal expenditure programs. The first program, which provides institutional training, involves a federal-provincial contract for the 'purchase' of a specific period of training, usually in provincial educational institutions, at a negotiated price. Counsellors at Canada Employment Centres then refer clients for this training, and it is during the period of institutional training that federally referred clients receive the allowance mentioned earlier.[21] Federal payments for the actual training cover virtually all provincial costs and are paid to the provinces. The provinces, in turn, have considerable room to determine what training will actually be made available for federal purchase. Payments to the provinces under this arrangement totalled $300 million in 1977–78.

The second and smaller A.O.T. program provides for training on the job in co-operation with participating firms. Its lower cost reflects, in part, the fact that these trainees are gainfully employed and thus paid by their employer. Federal payments to the participating firms compensate for the lower productivity of trainees compared with that of experienced workers. The total expenditure on industrial training in 1977–78 was $75.7 million; 73 per cent of this amount was spent in Quebec, Ontario, and British Columbia. The expenditure in Nova Scotia ($5 million) was relatively large because of the inclusion of training programs operated by the federal Cape Breton Development Corporation (DEVCO).

Employment injury and occupational safety

The payments made for employment-injury benefits and occupational safety, some $20.3 million in 1977–78, represent federal payments to the provinces for the provision, under contract, of services to federal employees or other employees subject to federal jurisdiction. In certain cases the province administers federal legislation and is compensated in return. This provincial-federal relationship could be described as one in which the federal government buys administrative services from the provinces.

Home insulation grants

The final program included in Table 5, involving home-insulation grants, was developed initially in response to the uniquely high dependence of Nova Scotia and Prince Edward Island on imported crude oil for the generation of electricity and the resultant higher-than-average costs of electricity and home heating. Under this scheme federal grants of $14.4 million were given to residents of those two provinces only, for the purchase and installation of home insulation. The provinces supplement these grants with loans at subsidized interest rates. The program was extended to cover all provinces during 1977, but only another $1.3 million was spent in that year, largely because of the lengthy lead time required for such a program to take effect. The initial phase of the program is of particular interest because it involved federal grants to the residents of only two provinces.

Shared-Cost Programs

Nothing so surely marks the flexibility of Canadian federalism in relation to income distribution and social security as the rise and fall of the conditional grant or shared-cost program. Whether applauded as the mark of a flexible Constitution or denounced as a less than subtle form of intergovernmental bribery, the shared-cost program remains a significant, but much diminished, feature of federal-provincial fiscal relations. Table 6 summarizes the federal payments to each of the provinces under the twenty shared-cost programs that appear most clearly to fall within the definition of income distribution and social security.

It is quite apparent from this table that most of these twenty programs are of very modest financial proportions. Indeed, of the $1.6 billion total federal expenditure in 1977–78, fully 91 per cent was spent in behalf of only three shared-cost programs. One of these, the Canada Assistance Plan, accounted for 60 per cent of all federal expenditures under shared-cost arrangements.

The Canada Assistance Plan (CAP)

This program is the last to survive of the major health-and-welfare conditional grants. Its erstwhile partners, medicare and hospital insurance, are now financed unconditionally as 'established programs'. The CAP is an open-ended arrangement whereby the federal government reimburses each province for 50 per cent of the province's expenditures on almost all forms of social assistance and welfare support. The CAP was launched in 1966 and has absorbed a host of categorical income-support and social welfare programs. In 1977–78 the federal government transferred nearly $1 billion to the provinces under this arrangement. Quebec has opted out of most of the CAP provisions and receives its equivalent transfer unconditionally in the form of increased tax room and cash-adjustment payments.

Bilingual education

The second significant shared-cost program is that supporting second language (English or French) or bilingual education programs. In making the grants for elementary and secondary school programs, the federal government pays an amount equal to 9 per cent of the provincial cost of providing minority-language instruction. In the post-secondary grants the federal government pays 10.85 per cent of provincial grants to all

Table 6: *Federal Payments to Provinces under Shared-Cost Programs, 1977 – 1978*[a]

	Nfld.	*P.E.I.*	*N.S.*	*N.B.*	*Que.*	*Ont.*	*Man.*	*Sask.*	*Alta.*	*B.C.*	*Total*
					(*$millions*)						
Canada Assistance Plan	40.0	7.4	47.6	51.1	.3	395.7	54.5	55.8	115.5	198.9	966.8
Welfare Services Plan			1.8			4.6					6.4
Welfare Information Systems	.2	.1	.4				.1				.8
Vocational Rehabilitation	.4	.1	1.6	.9		11.4	2.2	2.4	2.8	.5	22.3
Manitoba G.A.I. Experiment							3.6				3.6
Young Offenders Agreements				.4		15.9					16.3
Disabled Persons Allowances			.03				.02		.3		.4
Blind Persons Allowances	.1	.02	.2	.01			.02	.01	.06		.4
Health Professionals Training[b]	.1		.6	.1	8.1	9.6	.1	2.5	.2	2.2	23.5
Compensation to Crime Victims				.03	.6	.8	.1	.1	.2	.2	2.0
Legal Aid	.4	.1	.7	.5	5.2	6.9	.8	.8	1.6	2.0	19.0
Manpower Training Research		.03			.02						.1
Agricultural Manpower		.1	.1	.1	.8	1.2	.4	.3	.5	.3	3.8
Co-op Education	.02		.02	.01	.6	.6	.1	.1	.1		1.6
Bilingual Education	.8	.5	2.0	12.2	127.1	36.1	2.6	1.1	2.2	2.3	186.9
Citizenship Education			.02		.3	1.7		.03	.07	.8	2.9
Regional Development Agreements	54.5	29.8	34.3	43.4	117.6	11.0	14.6	9.4	5.5	7.4	327.5
Special Areas			1.4	.8	1.4						3.6
ARDA & Special (Natives)	2.3					6.1	4.2	5.7	1.9	5.2	25.4
FRED[c]				.6	5.2		.4				6.2
TOTAL	98.8	38.2	90.8	110.2	267.2	501.6	83.7	78.2	130.9	219.8	1 619.4

Notes:

a. F.P.R.O., *Federal-Provincial Programs and Activities, 1978*; Canada, *Public Accounts, 1978*.

b. Includes payments under Health Resources Fund.

c. Expired, payments made only for prior commitments.

eligible (that is, bilingual or minority-language) institutions. The grants are provided under five-year agreements, and in 1977–78 amounted to $187 million; 94 per cent of this money went to New Brunswick, Quebec, and Ontario. Quebec alone received 68 per cent of the total on behalf of English-language schools and post-secondary institutions.

Regional development agreements

The third and final shared-cost program of any financial significance is the network of regional development agreements arranged by the federal Department of Regional Economic Expansion and each of the ten provinces. While these agreements might seem to have a focus more economic than social, they not only bear directly on income distribution, especially interprovincially, but they also include subsidiary programs and projects that involve social services as well. The agreements are different for each province and set out the broad objectives, priorities, and financial framework for regional development. The scope of these agreements runs all the way from the cost sharing of Prince Edward Island's comprehensive development plan "designed to create conditions in which the people . . . can develop their own economic enterprises, so as to raise *per capita* income with equity and create jobs, while maintaining the environment"[22] to the more limited objectives set for the agreements with Alberta and British Columbia: "to improve opportunities for productive employment . . . in areas or economic sectors . . . which, relative to other areas or sectors . . . require special measures . . . and to encourage the equitable distribution of the benefits of such development."[23] In 1977–78 some $327.5 million in federal funds was transferred to the provinces; 85 per cent of this amount went to the five Eastern provinces.

Other shared-cost programs

The remaining shared-cost programs are all relatively small, together involving $138.2 million in federal transfers, that is, 8.5 per cent of the total for all shared-cost programs. They cover such disparate provincial activities as welfare-related projects ineligible under the Canada Assistance Plan (Welfare Services Program), vocational rehabilitation programs, an experimental guaranteed income scheme in Manitoba, legal aid, research related to employment training, citizenship education, and rural development (ARDA).

The Canada and Quebec Pension Plans

The Canada and Quebec Pension Plans warrant specific reference here partly because they do not fall neatly into any of the foregoing categories. They are devices both to accumulate vast pools of investment capital and to pay earnings-related retirement, survivor, and disability pensions distinct from the wholly federal basic and supplementary pension programs described above. The two separate, but almost identical, Canada and Quebec Plans were established in 1965 after a lengthy and sometimes acrimonious federal-provincial debate. They both require matching contributions from virtually all employees and employers, and both have their constitutional basis in section 94A of the BNA Act as amended in 1964. The Quebec Plan is administered wholly within that province, and the contributory insurance fund is available for investment by the province. The Canada Plan is administered by the federal government and operates in all the other provinces; its fund is returned to those provinces in proportion to contributions received and is available for the purchase of provincial, or provincially guaranteed, securities.

Table 7 illustrates the extent of the two features of the Canada and Quebec Pension Plans. In 1977–78 the two pension funds yielded $2.25 billion in investment capital for the ten provinces. The accumulated investment fund, representing loans outstanding to the provinces, in 1977–78 was a staggering $17 billion. This represents fully 30 per cent of the total provincial government debt for all provinces in Canada.

The second feature of the pension plan is, of course, the benefits paid to older persons, survivors, and the qualified disabled. In 1976–77 just over $1 billion was paid in benefits. This is only about one-fifth the amount paid out by the federal government in direct old age pensions and guaranteed income supplements, but because the Canada and Quebec Plans are contributory and funded, benefit expenditures will grow markedly as an increasing number of contributors retire. In the absence of constant increases in contribution levels, the amount left over after benefits are paid will eventually disappear, and at that point the purchase of provincial securities will also end.

Tax Expenditure Programs

It was noted at the outset of this discussion that governments have a basic choice of increasing or decreasing taxes as

Table 7: *Loans to Provinces from Canada and Quebec Pension Plan Funds and Payments to Individuals from Canada and Quebec Pension Plans*[a]

($millions)

	Nfld.	*P.E.I.*	*N.S.*	*N.B.*	*Que.*	*Ont.*	*Man.*	*Sask.*	*Alta.*	*B.C.*
Loans to Provinces										
1976–77	31.0	6.4	59.7	45.2	615.8[b] 7.7[c]	812.8	86.6	65.3	150.7	224.2
1977–78	33.0	6.8	62.9	48.0	677.4[b] 7.5[c]	851.1	91.1	69.3	162.0	237.3
Total to 1978	247.9	50.2	491.6	372.0	4 735.6[b] 66.7[c]	6 853.5	728.9	561.3	1 231.6	1 834.8
Payment to Individuals										
1976–77	15.8	4.8	45.5	29.0	266.2[b] 3.3[c]	433.4	50.6	40.4	65.8	117.4

Notes:

a. Statistics Canada, *Social Security, 1978*; F.P.R.O., *Federal-Provincial Programs and Activities, 1978*.

b. Quebec Pension Plan.

c. Canada Pension Plan.

instruments of income-distributive and social service policies. The selective reduction of tax liabilities, especially that of the income tax, is, of course, a device almost as old as taxation itself. But the massive size of tax revenues today gives these deductions or exemptions a new significance.

Tax expenditures take essentially three forms. First, there are deductions or exemptions open to all taxpayers who fit the special definition of the taxing legislation: for example, the taxpayer is a bona fide fisherman and thus eligible for special tax treatment available to all fishermen. Secondly there are tax-reducing options, such as the RRSPs and RHOSPs, which require that the taxpayer put what would otherwise be taxable income into a special savings plan. Finally, there is a new generation of tax expenditures, like the child tax credit, that use the personal income framework to calculate a tax credit that may increase as income decreases and may even result in a payment from the government to the individual (a net refund or 'negative tax') if the calculated credit is large enough in relation to the individual's income.

The federal government undertook a pioneering study of its own tax expenditures and in 1979 published a report on its findings. The study estimated the total tax revenues forgone as a result of tax credits, deductions, or exemptions. The result is, of course, an artificial calculation since it is assumed that the current rates and rate structure would remain unchanged, although it is obvious that a reduction or elimination of tax deductions or exemptions could justifiably lead to a general reduction in rates that would leave the total tax revenues unchanged. Nevertheless, this method of calculation does highlight the extent of the income redistribution effected by the income tax, for the key point is that different taxpayers benefit differently from higher rates and larger exemptions by comparison with lower rates and fewer exemptions.

Excluding certain tax credits and exemptions that are primarily economic, such as capital-depletion allowances, the total federal tax expenditures relevant for our analysis amounted to $17.4 billion in 1976. This is broken down in Table 8 into the nine major categories of tax expenditures and 'assigned' to each province in the same proportion as the proportion of the relevant (corporate or personal) federal income tax collected in that province. The amount of some of these 'expenditures' is substantial. The deductibility of pension contributions generates a tax expenditure of slightly over $2 billion that rivals federal outlays of $2.7 billion on family allowances.

Table 8:[a] *Federal Income Tax 'Expenditures' by Province,*[b] *1976*

	(*$millions*)										
	Nfld.	*P.E.I.*	*N.S.*	*N.B.*	*Que.*	*Ont.*	*Man.*	*Sask.*	*Alta.*	*B.C.*	*Total*
Standard exemptions (marital, medical, etc.)	27.1	5.8	50.4	38.8	356.5	858.3	78.0	76.0	184.9	264.2	1 940.0
Tax benefits to farmers & fishermen	.8	.2	1.4	1.1	9.9	23.9	2.2	2.1	5.1	7.4	54.1
Pension benefits (income & savings)	28.6	6.1	53.2	40.9	372.4	902.3	81.8	79.8	192.3	278.3	2 035.7
Education credits	1.0	.2	1.9	1.5	13.3	32.2	2.9	2.8	6.9	9.9	72.6
Capital gains & investment income	12.1	2.6	22.3	17.4	169.4	395.5	36.5	35.1	92.2	120.1	903.2
Homeowner benefits	81.0	17.3	150.4	115.7	1 052.5	2 550.3	231.3	225.5	543.6	786.5	5 754.1
Non-taxable income (Workmen's Comp., UIC, etc.)	13.5	2.9	20.6	19.4	228.7	474.2	45.2	42.5	129.1	139.5	1 115.6
Tax-averaging provisions	2.2	.5	4.0	3.1	28.2	68.4	6.2	6.0	14.6	21.1	154.3
Contracting-out					965.0						965.0
TOTAL	166.3	35.6	304.2	237.9	3 195.9	5 305.1	484.1	469.8	1 168.7	1 627.0	12 994.6

Notes:

a. Canadian Tax Foundation, *The National Finances, 1978–79.*

b. Allocation to provinces calculated as fraction of federal personal or corporate income tax collected in each province (personal or corporate income tax as indicated in original federal estimate).

c. Includes absence of tax on imputed income from equity in a home.

Sources: Canada, Department of Finance, *Government of Canada Tax Expenditure Account, 1979.*

In the eight provinces that use the federal income-tax base as their own, the federal tax expenditures are fully duplicated as provincial tax expenditures in the same ratio that provincial tax rates bear to federal rates. This is true also of personal income-tax expenditures under the Quebec personal income tax, and an important question thus remains: How does the treatment of Quebec taxpayers compare to that of other Canadian taxpayers as a result of the Quebec government's different tax-expenditure policies?

Four provinces have added tax credits of their own to the federal base so that the provincial tax base, for those who qualify, is reduced below that calculated for federal taxes. This technique has so far been used to reduce the burden of municipal property taxes. The total provincial tax expenditures on such homeowner- or tenant-property tax credits in Ontario, Manitoba, Alberta, and British Columbia amounted to $610 million in 1977–78.

Constitutional Options

For reasons already stated, one of the constitutional options that has been posited is not germane to income distribution and social services. This is the option of a sovereign and independent Quebec whose relations to Canada-without-Quebec are governed by international law. The remaining options are the symmetric constitution, the asymmetric constitution, and sovereignty-association.

Canadian experience in administering income distribution and social services, if it does nothing else, indicates that the symmetric constitution offers a particularly flexible option. The fundamental symmetry of the BNA Act has accommodated both centralization and decentralization. It is even more remarkable that this symmetric constitution is no barrier to asymmetric federalism, particularly in the areas of income distribution and social services. So great is the flexibility of the BNA Act that its continued existence, unchanged by as much as a comma, can be seen as an option in its own right, an option that leaves the future of Canadian federalism open to either symmetry or asymmetry. This option also serves as a bench-mark from which to gauge the need for formal constitutional changes that, within a federal framework, would either reinforce symmetry or formally sanction asymmetry.

The British North America Act

What the British North America Act permits with respect to income distribution and social services is nothing short of astounding. On the basis of the topics already treated in this essay, the following points are particularly significant.

Taxation

Both levels of government have concurrent access to the revenue sources that constitute the major instruments available to modern states that wish to use taxation to modify income distribution. In a framework where each level of government takes responsibility for levying its own taxes, there is complete freedom to choose between separate and joint tax-collection machinery. Separate collection machinery, at a cost to the taxpayer of complexity that can be accepted or rejected at the ballot box, leaves the federal government and any province completely free to use tax rates and expenditures to achieve any desired pattern of horizontal or vertical income distribution. Joint collection machinery, on the other hand, requires some governmental discretion if the process of tax compliance is to be reasonably simple. With respect to the personal income tax, federal changes in designating taxable income must be contemplated in light of their effect on the provincial tax base and hence on provincial revenues. Federal flexibility may be limited, however, by the existence of negotiated provincial revenue guarantees. Meanwhile provincial discretion in the making of tax expenditures is limited by the need to negotiate the accommodation of special surcharges or credits by the joint collection machinery. But within a framework of negotiation, joint collection is no barrier to the use of taxation to vary income distribution both federally and provincially. In addition there is nothing to prevent some provinces from taking advantage of joint machinery and others from remaining outside the joint framework; in these circumstances relations in tax collection would be asymmetric.

Constitutional flexibility and the provision of social services

In matters of health, education, and welfare, the division of jurisdiction prescribed by the BNA Act is overwhelmingly in favour of the provinces. Certain social services of minor fiscal significance — those to Native persons and veterans, for example — stem from areas of federal jurisdiction. But unemployment insurance is the only major program that is not assigned to provincial jurisdiction.

The BNA Act provides a symmetric Constitution highly decentralized in jurisdiction over social services; it also provides a Constitution that is sufficiently permissive about the federal spending power to tolerate enormous ebb and flow in the tide of centralization. Through conditional grants, the federal government can bring provincial priorities to focus on the most specific services in relation to the most minutely prescribed standards. On the other hand, conditional grants can just as easily be absorbed into broader shared-cost programs. Such umbrella programs can, in turn, disappear into tax room or unconditional grants.

Meantime, the asymmetric relations that can be caused by the application of the federal spending power are virtually unlimited. Consider the proposed constitutional reform that would make the federal spending power depend on a consensus among a minimum number of provinces, with the proviso that a dissenting province could contract out of the proposed program and receive a fiscal equivalent. Far from being an invention of abstract constitutional theory, this proposed reform simply seeks to formalize practices enshrined by usage within the scope of the BNA Act. This constitution presents no barrier to contracting-out, whether from federal-provincial shared-cost programs, wholly federal spending programs, or federal initiatives to induce provinces to change their tax levels for purposes of economic policy. And contracting-out is only one kind of asymmetry that can be accommodated by the BNA Act.

As the evolution of family allowances testifies, the present Constitution permits individual provinces to vary, by their own legislation, the level of payments that otherwise wholly federal spending programs confer on individuals. As the history of the home-insulation program attests, the federal government can make specific grants in some provinces that are not available in others. Meantime the world of regional development agreements is a world of bilateral federal-provincial negotiations that produce widely asymmetric relations. On the basis of these agreements, it has been possible for a single federal agency virtually to by-pass certain provincial Cabinets and deal with municipalities, school boards, universities, and similar institutions as if they were under federal jurisdiction. And the potential of the BNA Act to produce asymmetric relations has by no means been exhausted. The whole area of employment counselling, adult occupational training, and job placement is a case in point. Given the absence of jurisdictional guidelines in the BNA Act, this area is as provincial as it is federal. There is nothing in the Act to prevent arrangements that would permit any given province or provinces to contract out of federal employment programs. Nor is there anything to prevent the federal government from vacating these programs in favour of the provinces. Again, given such a devolution, there would be nothing to prevent certain provinces from 'contracting-in' to federal employment services, just as eight provinces currently contract with the federal government for the provision of provincial policing by the R.C.M. P.

The Constitutional Potential of the BNA Act to Accommodate Massive Decentralization

The flexibility of the BNA Act allows it, among other things, to accommodate a much higher degree of decentralization than that exhibited by the current financial framework of income distribution and social services. Not only can this massive decentralization be accomplished without altering the federal-provincial division of jurisdiction, but it could also be staged over time to permit a sequential process that could proceed more or less quickly or be arrested or reversed on the basis of trial and error. Logically, for example, the present shared-cost programs, representing provincial responsibilities to which the federal government makes financial contributions, and in return for which it imposes legislative or administrative conditions, could be taken as the first targets for decentralization. The means of achieving decentralization would follow past Canadian practice and thus contain two elements: withdrawal of federal participation in program design and financial administration, and the institution of a corresponding unconditional fiscal transfer to the provinces consisting of equalized tax room, equalized cash payments, or both.

Following this pattern, the second most likely areas for decentralization would be those federal programs in which there is an established provincial legislative or contractual participation. Federal withdrawal might proceed in stages from the present degree of provincial participation, through the shared-cost stage of provincial responsibility with federal participation, to a final withdrawal similar to that suggested above for existing shared-cost programs. Alternatively, the process could omit the intermediate phase and move directly to a federal withdrawal with a corresponding increase in unconditional transfers. This shift might occur simultaneously for all programs in this category or, more realistically, progress program by program.

The third and final degree of decentralization would then be the 'provincialization' of what are currently wholly federal programs with or without regional variations. Again, such decentralization might initially involve one or more programs and might proceed by stages or all at once. The capacity of the BNA Act to accommodate this decentralization would reach its limit with unemployment insurance, social services for Native persons, and oil-import subsidies. The first two are constitutional responsibilities of the federal government; the third is a scheme of interprovincial redistribution and is therefore beyond the capacity of individual provinces.

The decentralization permitted by the present BNA Act can thus be taken as presenting the possibility of three distinct stages of decentralization. These stages may be considered in logical order: shared-cost programs first, followed by federal programs with provincial participation, and then wholly federal programs. The degree of decentralization possible under this scheme in its three stages is represented in Table 9. Federal payments ranging from $38.2 million in Prince Edward Island to $501.6 million in Ontario were made under shared-cost programs that totalled $1.6 billion. Federal programs with provincial participation add another $2.5 billion to federal expenditures, with a low of $16 million in Prince Edward Island and a high of $855.2 million in Ontario. Finally, wholly federal programs represent $5.7 billion, ranging from $47.1 million spent in Prince Edward Island to $1.9 billion spent in Ontario. The grand total for all three categories of programs in all ten provinces is $9.8 billion. As indicators of the choices open for decentralization within the framework of the present BNA Act, the three stages cumulatively involve current federal expenditures of $1.6 billion, $4.1 billion, and $9.8 billion for all provinces.

Constitutional Potential and the Limits of Public Finance

To suggest that the impact of the full degree of decentralization permissible under the BNA Act would be dramatic would be a gross understatement. The total shift of $9.8 billion would represent fully 73 per cent of the total of all personal income

Table 9: *Federal Expenditures by Province and Type of Program, 1977 – 1978*

	($millions)										
	Nfld.	*P.E.I.*	*N.S.*	*N.B.*	*Que.*	*Ont.*	*Man.*	*Sask.*	*Alta.*	*B.C.*	*Total*
Shared-Cost Programs	98.8	38.2	90.8	110.2	267.2	501.6	83.7	78.2	130.9	219.8	1 619.4
Established Programs with Provincial Participation[a]	80.7	16.0	103.3	84.9	691.2	855.2	109.0	103.2	211.4	255.5	2 510.4
Wholly Federal Programs[b]	164.0	47.1	261.2	207.8	1 418.5	1 940.1	299.4	279.0	392.8	649.3	5 659.2
TOTAL	343.5	101.3	455.3	402.9	2 376.9	3 296.9	460.4	460.4	735.1	1 124.6	9 789.0

Notes:

a. Excludes Home Insulation Program in Table 5.

b. Excludes Programs for Native Persons and Unemployment Insurance from Table 2 and Federal Oil Compensation Payments from Table 4.

taxes collected by the federal government in 1977. The tax consequences of adding this amount to provincial budgets would be even more dramatic. If the full amount were raised through increased provincial personal income taxes, total provincial revenue from the personal income tax would have to increase by 110 per cent, that is, from $8.9 billion to $18.7 billion. If the amount were spread over the three most important general provincial taxes, those levied on personal income, corporate income, and retail sales, revenue from these sources would have to increase by 62 per cent, that is, from $15.9 billion to $25.7 billion. These figures merely illustrate the size of the shifts involved; they are not intended to suggest a particular provincial response to decentralization.

Of course this represents the impact of the maximum degree of decentralization. If one considers only shared-cost programs, for example, the impact is much less dramatic. Federal spending on the shared-cost programs included in Table 4 could be shifted to provincial governments, with the net effect of decreasing federal personal income-tax revenue by 12.1 per cent and increasing total provincial personal income-tax revenue by 18.2 per cent. That is a redistribution substantially less than the one necessitated by the shift to Established Programs Financing (E.P.F.). The middle measure of decentralization, representing a shift of shared-cost and federal programs with provincial participation, cost the federal treasury $4.1 billion in 1977–78. If compensation were made through the personal income tax, it would entail a decrease in federal revenues from this source of 30.9 per cent and a corresponding provincial increase of 46.3 per cent. If the middle measure of decentralization were accomplished by a personal income-tax shift, the 1977–78 position of the two levels of government with respect to this tax source would be almost exactly reversed, with provincial revenue rising from $8.9 billion to $13 billion and federal revenue declining from $13.4 billion to $9.3 billion. That this would cause financial problems, perhaps compounded by considerations of economic policy, is likely. But the limitations that beset the middle stage of decentralization and, *a fortiori*, the third stage, are not constitutional. They can be addressed by various devices including E.P.F. unconditional grants that would have no impact on federal tax revenue, although they would sharply curtail federal program visibility.

How intractable are the financial limitations attendant on massive decentralization? It must be realized that these limitations are not restricted to the extent of shifts in revenue and expenditure. They are compounded by the uneven impact of these shifts on the several provinces.

Table 10 provides some basic data related to federal and provincial tax yields. The final line is perhaps the most important in demonstrating the wide disparities in the per capita yield of a single tax point. (A tax point is simply the yield of 1 per cent of the basic federal tax.) This yield varies from a low of $3.69 in Prince Edward Island to a high of $8.19 in British Columbia. Against this must be set the per capita values of the federal expenditures that are the candidates for decentralization. As Table 11 shows, these values are very differently distributed. Precisely because the existing arrangements contain so much redistribution of income among the residents of different provinces, we find that the province with the lowest per capita yield per tax point is also the province with the highest per capita federal expenditure.

The range of impact on the several provinces may perhaps be illustrated most clearly by considering only the provinces at the two extremes. The average per capita cost of federal programs in the three categories was $417.98 in 1977–78. In Prince Edward Island this cost increased to $844.17, while in Alberta it dropped to $376.97. For Alberta to raise an additional $377 per capita would require an increase of 125 per cent in its personal income-tax revenue. For Prince Edward Island to raise an additional $844 per capita would require an increase of no less than 448 per cent in provincial personal income-tax revenue. This would involve revenues from provincial personal income taxation almost twice as great as the revenues currently obtained from the combined total of both provincial and federal personal income taxes in that province.

These are extreme examples that would be mitigated both by a lesser degree of decentralization and by a choice of fiscal transfer that involved less reliance on tax room. Nonetheless, the extent to which decentralization can magnify interprovincial disparities in fiscal capacity is a major constraint. Moreover, while provinces have unequal tax-raising capacities, federal expenditures in the area of income distribution and social services are inversely related to provincial tax-raising capacity. Thus general decentralization of these expenditures could create even larger interprovincial inequalities.

At this point the net effect of massive decentralization on the federal spending power would be the abolition of a number of

Table 10: *Federal and Provincial Personal Income Tax Payable by Province and Value of Provincial Tax Point, 1977*[a]

	Nfld.	*P.E.I.*	*N.S.*	*N.B.*	*Que.*	*Ont.*	*Man.*	*Sask.*	*Alta.*	*B.C.*
Federal Tax Payable ($millions)	179.8	35.3	332.3	248.1	2 749.6	5 734.2	491.7	430.8	1 342.5	1 805.5
Provincial Tax Payable ($millions)	127.8	22.6	212.5	167.1		2 910.8	332.0	275.2	589.2	953.6
Provincial Tax Rate (%)	57.5	50.0	52.5	54.67		44.0	56.0	58.5	38.5	46.0
Value of One 'Tax Point' ($million)[b]	2.22	.45	4.05	3.06	40.6[c]	66.15	5.93	4.70	15.30	20.73
Provincial Population (million)	.57	.12	.84	.70	6.29	8.44	1.03	.95	1.95	2.53
Per capita Value of One 'Tax Point' ($)	3.90	3.69	4.81	4.40	6.46	7.83	5.74	4.96	7.84	8.194

Notes:

a. Canadian Tax Foundation, *The National Finances, 1978–79*; F.P.R.O., *Federal-Provincial Programs and Activities, 1978*; Revenue Canada, *Taxation Statistics, 1979*.

b. Equals the amount of money produced by a provincial tax rate of one per cent of the federal basic tax.

c. This is a computed rate only; Quebec's personal-income tax is not calculated as a percentage of the federal tax.

Table 11: *Per Capita Federal Expenditures by Province and Type of Program, 1977 – 1978*

	Nfld.	*P.E.I.*	*N.S.*	*N.B.*	*Que.*	*Ont.*	*Man.*	*Sask.*	*Alta.*	*B.C.*	*Average All Provinces*
Shared-Cost Programs	173.33	318.33	108.10	157.43	42.48	59.43	81.26	82.32	67.13	86.88	69.15
Federal Programs with Provincial Participation	141.58	133.33	122.98	121.29	109.89	101.33	105.83	108.63	108.41	100.99	107.19
Wholly Federal Programs	287.72	392.5	310.95	296.86	225.52	229.87	290.68	293.68	201.44	256.64	241.64
TOTAL	602.63	844.17	542.02	575.57	377.89	390.63	477.77	484.63	376.97	444.51	417.98

visible federal spending programs; this, in turn, would make an unprecedented call on massive unconditional equalization payments. Any response to this call would magnify the shortcomings of the present equalization formula and might, indeed, force a departure from equalization geared to fiscal capacity. The poorer provinces do not merely have a lower taxing capacity; they must also spend proportionately more on programs of income distribution and social services. In effect the basis of equalization payments might have to shift from a representative revenue approach to a fiscal need or income approach. The equalization practices that have prevailed would also be acutely challenged on a second front. Under these practices provinces with an above-average fiscal capacity and a below-average fiscal need have simply received nothing rather than negative equalization grants. The need for negative equalization grants becomes acute once provincial revenues exceed federal revenues, and once direct federal expenditure programs are no longer available to discriminate against affluent provinces with a low fiscal need. It is at this point that the financial limitations attendant on the increased decentralization permitted by the current division of jurisdiction would collide with a constitutional limitation imposed by the BNA Act. Section 125 of the Act prohibits federal 'taxation' of provincial revenues in affluent provinces for the purpose of exacting contributions to an equalization pool. This restriction leads to the consideration of a revised symmetric constitution.

A Revised Symmetric Constitution

The flexibility of the BNA Act has obvious appeal, not least because it permits degrees of decentralization that can be staged in any sequence, tried experimentally, and reversed if necessary, all without any need for formal constitutional change. On the other hand, "the fundamental defect of flexibility is . . . that the federal system is cut adrift from its constitutional base and becomes a regime shaped decisively by the bargaining powers of the federal and provincial governments rather than by legal norms."[24]

The purpose of this essay is to canvass options, not to debate their relative merits. In considering a symmetric option to the present symmetric, but enormously flexible, Constitution, we shall consider legal norms that would constitutionally enforce symmetry in practice and would permit a greater degree of constitutionally sanctioned symmetric decentralization. The limitation on equalization uncovered in the present BNA Act offers a fundamental case in point. Assume a symmetric constitution that makes mandatory the massive decentralization that is merely permissible under the BNA Act. Such a constitution should include a provision whereby the federal government can tax the revenues of provinces in order to exact contributions to an equalization pool. In the absence of such a provision, the revised constitution would reflect a sense of extensive community insufficient to sustain mandatory equalization under federal government auspices. Equalization based only on voluntary contributions from the governments of the more affluent intensive communities, as the Task Force on Canadian Unity correctly noted, is confederal[25] rather than federal.

But assuming a constitutional change that would facilitate equalization by giving the federal government the authority to tax provincial revenues, what of a blueprint for decentralization that could be constitutionally sanctioned along symmetric lines? The most specific blueprint available is the one to be found in the Beige Paper of the Constitutional Committee of the Quebec Liberal Party.[26] That blueprint provides a pertinent model for income distribution and social services. It also contains a number of asymmetric features that will be examined when that option is considered. With respect to symmetric changes in the division of jurisdiction, the Beige Paper essentially prescribes the following:

- Adult occupational training and allowances, together with student subsidies and bursaries, which are not matters specifically mentioned in the BNA Act, should come under exclusive provincial jurisdiction.
- Unemployment insurance, currently under federal jurisdiction according to section 91(2A) of the BNA Act, should be transferred to provincial jurisdiction.
- Section 94A, which endorses the concurrency that has made the Canada and Quebec Pension Plans possible, should be abolished, and all matters of social insurance should be placed under exclusive provincial jurisdiction.

The third prescription clearly envisages a division of jurisdiction that would permit ten provincial pension plans, each with its own level of benefits and its own premium structure. The Beige Paper's constitution, however, provides no barriers to federal premium collection nor, for that matter, to the achievement of common benefit levels and premium structures through intergovernmental negotiation. As for the immediate financial impact of the proposed constitutional change, no fiscal shift appears to follow since Quebec already has its own pension plan, and Canada Pension Plan premiums constitute a fund that is returned to the other nine provinces for borrowing purposes.

The fiscal shifts attendant on the first and second jurisdictional prescriptions advanced in the Beige Paper are summarized in Table 12, which brings together information already given in earlier tables in this essay. Table 12 reports federal expenditures on adult training and student loans in 1977–78. By definition the jurisdictional transfer of unemployment insurance to the provinces would be accompanied by jurisdiction over employer and employee premiums. For this reason only federal expenditures on unemployment insurance from the Consolidated Revenue Fund are included in the table. The total amount of the potential shift is $2.1 billion. This is more than the $1.4 billion involved in terminating shared-cost programs, but less than the $4.1 billion that arises from transferring to the provinces both shared-cost programs and federal programs with provincial participation. But given the uneven incidence of unemployment and the nature of the unemployment-insurance program, the interprovincial disparities are enormous.

Newfoundland, for example, on receiving jurisdiction over employment training, student loans, and unemployment insurance, would require a fiscal transfer by way of tax points or unconditional grants of $295 million or $361 per capita. At the same time Ontario would require $35 per capita, but Alberta would actually run a surplus of $29.9 million. This is because Alberta, which had the lowest unemployment of any province in 1977–78, produced a surplus of $105 million over benefits in the federal unemployment-insurance account. This surplus more than wipes out the expenditures Alberta would incur on the transfer of jurisdiction over adult training and student loans. The interprovincial redistribution that is so strongly inherent in the unemployment-insurance program accordingly makes it possible for a province to run a surplus on acquiring new program responsibilities. Because of this possibility a constitutional provision that allows the federal government to tax provincial revenues is all the more necessary.

It must be emphasized, of course, that the fiscal shifts calculated in this essay are only to be taken as illustrations meant to give substance to the axiom that serious proposals for

Table 12: *Federal Expenditures under Programs Proposed for Decentralization by Quebec Liberal Party Beige Paper*

(1977 –78 expenditures in $millions)

	Nfld.	*P.E.I.*	*N.S.*	*N.B.*	*Que.*	*Ont.*	*Man.*	*Sask.*	*Alta.*	*B.C.*	*All Provinces*
A.O.T. Allowances	7.7	1.8	9.3	7.5	48.5	59.1	8.9	6.5	16.1	18.7	184.1
Canada Student Loans	8.5	2.2	17.8	10.7		135.4	15.2	11.4	32.2	26.7	260.1
A.O.T. (Institutional)	13.2	2.9	13.4	11.5	99.7	85.0	11.6	9.8	24.0	28.9	300.0
A.O.T. (Industrial)	2.2	1.1	5.0	4.3	19.7	25.0	3.1	3.1	1.9	10.3	75.7
Unemployment Insurance[a]	173.9	29.4	116.6	160.4	809.4	−7.6	−9.2	−5.5	−105.1	157.3	1 319.6
TOTALS	205.5	37.4	162.1	194.4	977.3	296.6	29.6	25.3	−29.9	241.9	2 139.5

Note:

a. Net payments from Consolidated Revenue Fund.

constitutional change in the division of jurisdiction should never be divorced from fiscal considerations. This axiom was ignored in the process of formulating the Victoria Charter. The result was a jurisdictional proposal for social services — specifically, the charter's changes to section 94A — that in the absence of any consideration of the amounts of money involved, was wide open to diverse interpretation. In the event, this deficiency scuttled the Charter.

If it is understood that quantitative notions, however simplistic, are indispensable when considering changes in jurisdiction, it should be equally apparent that these quantitative notions do not forecast outcomes. Indeed the implications for economic policy attendant on provincial jurisdiction over a program like unemployment insurance could invalidate any calculations based on prior revenue and expenditure experience. This essay does not pretend to deal with the economic implications of constitutional change, but it acknowledges that the economic reasons for transferring to the provinces jurisdiction over unemployment insurance might eclipse any transitional difficulties in making fiscal transfers.[27] Integrating provincial responsibility for unemployment insurance, welfare assistance, and minimum wages could induce 'have-not' provinces to combine lower minimum wages with more stringent unemployment and welfare benefits, thereby increasing labour mobility and achieving a more efficient allocation of labour resources throughout Canada.[28]

The Beige Paper blueprint for symmetric decentralization accordingly deserves more positive treatment than it received at the hands of the Quebec Liberal Party when the Party rejected the unemployment-insurance proposal. Moreover the Beige Paper's general approach to formal constitutional revision of income distribution and social services, by stressing the importance of staged negotiation and sequential change, is well tailored to the fiscal complications that are part of constitutional revision in this area.

An Asymmetric Constitution

If asymmetric constitutional provisions are prominently featured on most menus for constitutional change, it is because of the substantial asymmetry that has been permitted under the BNA Act and that so faithfully reflects the Canadian condition. Basically an asymmetric constitution will feature legal norms that sanction different divisions of jurisdiction in different parts of the federation. Two quite distinct approaches are possible. The first is permissive and makes asymmetry generally available. This approach has been designated 'special status for all'. The second approach constitutionally requires specific degrees of asymmetry that apply only to designated provinces. This has been called 'special status for Quebec', but it could just as easily be adapted to provide special status for any specific province or group of provinces.

Permissive asymmetry

Reform proposals have advanced three methods whereby permissive asymmetry can be constitutionally sanctioned. The first is the product of the search for constitutional limitations on the federal spending power. Federal spending initiatives in areas of provincial jurisdiction would be prohibited unless a favourable provincial consensus — say the agreement of six provinces — had been obtained. Provinces that did not form part of the consensus would be entitled to receive the fiscal equivalent of the proposed initiative. This is constitutionally sanctioned contracting-out. The second method is to designate certain subjects as matters of concurrent jurisdiction with provincial paramountcy. Provinces that choose to exercise their paramountcy will consequently exercise jurisdiction over more matters than provinces that do not. The third method is legislative delegation, whereby the federal government and any province could choose to delegate to each other matters otherwise under federal or provincial jurisdiction.

The first two methods can be distinguished from the third in that delegation requires prior agreement between the federal Parliament and provincial Legislatures. By contrast, constitutionally sanctioned contracting-out and the exercise of provincial paramountcy are at the discretion of any given province and are accordingly unilateral and unpredictable. It is possible to argue that only Quebec, because of its cultural and linguistic distinctiveness, would take advantage of contracting-out and provincial paramountcy. This has been so both in relation to the contracting-out that is currently permissible under the BNA Act and in relation to the provincial paramountcy made available by section 94A. Constitutionally sanctioned contracting-out and concurrency with provincial paramountcy accordingly beckon as means whereby Quebec can achieve a form of special status in the guise of special status nominally available to all provinces.

The problem with this argument is that constitutionally sanctioned contracting-out is very different from the contracting-out that, under present practice, requires federal consent. As for concurrency with provincial paramountcy, the longer the list of powers in this category, the greater the likelihood that any of a number of provinces would find the attraction of exercising paramountcy irresistible.

These two methods would accordingly expose to vast uncertainties programs of income distribution and social services. Furthermore the question of fiscal compensation would reach acute dimensions. Consider a situation in which unemployment insurance was under concurrent jurisdiction with provincial paramountcy, and in which Alberta and Quebec chose to exercise their paramountcy. On exercising its paramountcy, Alberta, under our 1977–78 calculations, would gain premium revenue that exceeded its expenditure responsibility by $105 million. Quebec, on the other hand, would become responsible for an expenditure over and above premium revenue that would give it a claim to fiscal compensation by way of a tax transfer or unconditional grant of $809 million. A better way of fomenting federal-provincial, regional, and dualist acrimony could scarcely be devised.

Delegation, the third method for achieving permissive asymmetry, is a more attractive option precisely because it requires the consent of the federal Parliament and the provincial Legislatures. It therefore does not expose the federal level of government to provincially sprung surprises. The act of delegation would have to be preceded by negotiations that would ensure that any transfer of jurisdiction had been examined in the light of its full fiscal consequences. Again, delegation agreements could be for specified periods and, accordingly, reversible on the basis of trial and error. Furthermore delegation is a two-way street that can involve the transfer of provincial jurisdiction to the federal government, as well as the transfer of federal jurisdiction to one or more provincial governments. The latter feature is particularly desirable if a revised constitution involves substantial jurisdictional decentralization. Quite appropriately the Beige Paper couples the symmetric decentralization it envisages with a provision for delegation.

If there is a weakness in delegation as a constitutional method for achieving permissive asymmetry, it stems from the otherwise meritorious fact that delegation will be the product of bilateral negotiation. A study of regional development agreements captures the two sides of bilateralism in observing that "bilateralism is as much a federal refusal to extend its special arrangements made with one province to all as it is a provincial hope for a special private 'deal'."[29] Some rather bleak conclusions follow about the consequences of a federalism whose asymmetry is the result of bilateral federal-provincial negotiations. Given any degree of federal bureaucratic ambition, bilateralism enables "the federal regime to penetrate into provincial jurisdictions as and when the opportunity presents itself."[30] If greater federal jurisdiction in some provinces is thought desirable, consideration of more explicit constitutional norms is warranted. Designated special status for the Maritimes would constitute such a norm.

Special status for the Maritimes

It is possible to envisage an asymmetric constitution that would confirm existing federal jurisdiction in the Maritime provinces whatever division of jurisdiction prevailed elsewhere in Canada. An asymmetric constitution could go further by confiding to the exclusive jurisdiction of the federal government all programs that are currently the subject of shared-cost arrangements in the Maritimes. What would be the financial implications of such a step?

Current provincial spending under these arrangements is related to federal spending under the terms of each shared-cost program. It is not difficult, therefore, to estimate the provincial expenditures that would become candidates for federal assumption. Most of the programs, in fact, are shared on a fifty-fifty basis so that provincial expenditures may be assumed to be approximately equal to federal contributions. The major exceptions to this pattern are the regional development agreements, where federal contributions range from 50 to 100 per cent. As an average, however, a provincial expenditure of 20 per cent of the total, or 25 per cent of federal expenditures, is probably a reasonable approximation. On this basis provincial expenditures on shared-cost programs in the Maritimes come to $158 million.

The asymmetry that would give up federal jurisdiction over current shared-cost programs in the Maritimes would also be reflected in a shift of tax revenues. If provincial contributions totalling $158 million were to be financed entirely by federal taxes levied in the Maritime provinces, the effect would be to increase federal personal income-tax revenue in those three provinces by 25.7 per cent and reduce provincial personal income-tax revenues by 39.3 per cent. The potential advantage of special status, at least for the Maritimes, is, of course, that it might be accompanied by increased, if implicit, equalization. Thus federal tax increases in the Maritimes might be less than the former provincial share of these programs; the 'deficit' would be covered by federal tax revenues derived from all of Canada. Viewed in this light, special status for the Maritimes would be the expression of special Canadian solicitude for the economic deprivation of those small provinces.

Special status for Quebec

In relation to the reality of a cultural dualism — and one that has been increasingly provincialized — the most straightforward form of constitutional asymmetry is one that would accord special status to Quebec. This constitutional status would be grounded in the cultural and linguistic distinctiveness of Quebec society and would recognize the relationship between the preservation of that distinctiveness and the policy instruments of income distribution and social services.

Special status for Quebec can be comprehended most easily by assuming that no decentralization would occur in relation to the other provinces, but that Quebec would assume responsibility for one or more of the three stages whereby symmetric decentralization could be accomplished under the BNA Act: shared-cost programs first, federal programs with provincial participation second, and wholly federal programs as the final stage.

Shifting federal expenditures on shared-cost programs to Quebec would not involve a major dislocation of current fiscal relationships primarily because so much has already been decentralized. The remaining federal expenditures in this category amount to $267 million. This is a mere $42.48 per capita, the smallest per capita amount for any province. It would be relatively simple to transfer an additional $267 million to Quebec in the form of reduced federal taxes; the whole amount represents less than 10 per cent (9.7 per cent) of federal personal income-tax revenue currently collected in the Province of Quebec.

Shifting to Quebec the second category of programs, that is, federal programs with provincial participation, would have considerably greater fiscal implications. The total federal expenditure amounts to $691.2 million ($110 per capita), and this sum represents fully 25 per cent of all federal personal income-tax revenue now collected in Quebec. Shifting to Quebec both shared-cost programs and federal programs with provincial participation would involve a shift of some $958.4 million and would require that that amount be transferred unconditionally as cash, increased tax room, or both. If transferred entirely in cash, the unconditional transfers of $3.5 billion now paid to Quebec would have to be increased by 27 per cent to $4.5 billion. If transferred via increased tax room, federal personal income-tax revenue from Quebec would have to be reduced from $2.7 billion to $1.8 billion, a decrease of 21 per cent. Almost any combination of these two options would, of course, be possible.

When we come to shifting wholly federal programs to Quebec's control, we encounter a fiscal change of massive proportions. Total federal expenditures in Quebec under the three categories used here, net of revenue from unemployment-insurance premiums, amounted to $3.8 billion in 1977–78. This amount exceeds federal revenue from the personal income tax in Quebec by $1.1 billion. At the very least, then, the shift could occur only through a combination of tax and cash transfers. Total expenditures would not necessarily increase, but the federal government would lose virtually all of its authority to redistribute income and provide social services *within* Quebec. The federal government's authority would be limited to redistributing income *between* Quebec and the other provinces. Whether or not this would alter the shape and extent of present federal or provincial programs operating within Quebec would, of course, depend on how the Quebec government handled its increased responsibilities. The mere transfer of resources and responsibility would not, in itself, cause any program changes.

The impact of special status need not be this dramatic since a great deal less than the shift of all program responsibility might be appropriate and acceptable. The problem is one of degree. Is Quebec's society so distinctive that no federal role is appropriate in the areas of income distribution and social services? Or is it that while some federal participation is appropriate, the degree of federal involvement should be less than it is in the other provinces? It is when the answer to the first question becomes affirmative that special status for Quebec begins to approximate sovereignty-association.

Sovereignty-Association

Sovereignty-association is not a federal constitutional option. It posits two sovereign states, Quebec and 'Canada-without-Quebec', each of which passes all the laws and levies all the taxes that are binding on its respective residents. The two sovereign states are associated to the extent that they share a common market and a single currency, and grant complete freedom of movement to each other's people. The associational government is composed of representatives of the two sovereign states. It can bind these states in matters specified in the associational 'treaty' or 'constitution'. To the extent that this treaty or constitution can be classed as a form of government, it belongs with the classic confederacy or *Staatenbund*.

What are the implications of this form of government for income distribution and social services? Since the sovereign states have full jurisdiction in this area, it is tempting — and it may be correct — to say that there is no difference between sovereignty-association and a sovereign Quebec whose relations to 'Canada-without-Quebec' are governed by international law. Consider, however, the implications for income distribution and social services of a common market, a single currency, and completely free movement of people. This arrangement points to the desirability of portable benefits, whether of health or unemployment or social insurance. An associational government might, therefore, come under considerable pressure to ensure portability, with positive consequences for program uniformity.

Consider now these same implications for equalization payments. In the absence of these payments, especially if there is a common currency, the economically weaker of the two sovereign states would be exposed to adjustments whose costs would be paid in terms such as high unemployment or increasingly deficient levels and standards of public services. What sense of associational community would there be to sustain equalization payments? The only basis on which such a sense might develop would lie in the self-interest of the economically stronger of the two sovereign states to protect itself from massive immigration of the weaker state's citizens. This sense of community has nothing in common with compassion or morality.

The failure of the 'Yes' forces in the Quebec referendum campaign has side-tracked, at least temporarily, sovereignty-association as a negotiable constitutional option. But this is not to say that active flirtation with the constitutional form in which sovereignty-association falls — the classic confederacy or *Staatenbund* — is also at a standstill. On the contrary, and precisely in the area of income distribution, confederal proposals are in the air. To find such proposals at an official level, one need seek no further than the budget paper entitled "Equalization and Fiscal Disparities in Canada," which was appended to the Ontario budget of 1980. Three of the reform models presented in that paper "entail voluntary provincial contributions to a national program or fund."[31] Such voluntary contributions are seen both as a means of financing equalization payments as currently understood and as a means of financing a petro-dollar recycling fund. For the government of an energy-consuming province to fly the kite of voluntary contributions from the governments of energy-producing provinces is to entertain an option to amending section 125 of the BNA Act in order to permit federal taxation of provincial revenues.

That option, however, is not free of constitutional significance. To posit 'voluntary contributions' either to an equalization or a recycling fund is to posit a situation in which the governments of contributing provinces seek and receive the commensurate spending authority from their respective Legislatures. The elected representatives of the intensive communities involved would be asked to place a specific price tag, expressed annually in dollars, on their sense of extensive community. This is indeed the pith and substance of a confederal constitutional option. The Task Force on Canadian Unity correctly classifies this option as confederal rather than federal. It then goes on to record its opinion of the "difficulty [confederal] systems have in achieving an effective distribution of resources to correct disparities among the constituent units."[32] If equalization payments are indeed the quantified measure of a sense of extensive community, it is easy to appreciate the difficulty that is posed when the task of quantification is shifted to representatives other than those elected to the level of government that embodies the extensive community. The Quebec referendum version of sovereignty-association was political sovereignty with economic association. When the Honourable Marc Lalonde subsequently characterized certain measures in the field of energy as "economic sovereignty with political association," he did not coin an empty slogan.

Constitutional Change and Constitutional Morality

The desire for constitutional change that has been abroad in Canada accounts both for this essay on income distribution and social services, and for the entire project of which it forms a part. Dualism and regionalism, the long-standing competitors of a sense of extensive community in Canada, have become increasingly provincialized. As dualist and regional aspirations have become provincialized, so also have they been increasingly expressed by provincial governments. These governments have responded to growing sentiments of intensive community. To some degree they have also expressed more selfish governmental interests. The clash of these more selfish interests with those peculiar to the federal governmental establishment has not abetted the process of finding a new equilibrium between loyalty to intensive communities and loyalty to the extensive community.

The BNA Act is such a flexible Constitution that it can accommodate a wide range of both symmetric and asymmetric change. To the extent, however, that the flexibility of the Act may have allowed the Canadian federal system to be cut adrift from its constitutional base, this system has come to be overly shaped by the bargaining powers of the federal and provincial governments. This leads to the quest for formal constitutional revision. But this is a quest in which these same governments are called upon to play a role as decisive actors.

Thus we return to a plea for constitutional morality.[33] Any approach to change, whether in the context of the BNA Act or in that of a formally revised constitution, calls for behaviour patterns that will transcend the narrow ambitions of governments. The course required is single-minded concentration on the importance of achieving an equilibrium between intensive and extensive communities that capitalizes on the socio-economic ties that continue to bind, as well as on those that dictate decentralization. The new behaviour patterns must be exhibited as much by the people as by those who govern them. Indeed those who govern and those who are governed must inspire one another.

To call for constitutional morality is to call for more than a one-time act of constitutional change. It is to call for long-term behavioural norms that will be the bedrock of on-going accommodation. In no area is this more essential than in that of income distribution and social services. Because social services are provided by government, they all too easily constitute the front line of clashing governmental ambitions. One-time agreement on change, whether or not this change is formally constitutionalized, can all too easily be subverted by the instruments that remain available to governments that respond too easily to electoral ambitions or bureaucratic aspirations. The most carefully designed allocation of responsibility for spending programs, whether that responsibility is symmetric or asymmetric, can be subverted and, indeed, turned into a new battleground, by a government that resorts to devices like tax expenditures or regulation to recover what it deems to be lost territory.

Notes

1. See, for example, the taxation proposals of the Canada West Foundation, the Constitutional Committee of the Quebec Liberal Party, and the Task Force on Canadian Unity.

2. An asymmetric federation is a federation in which one or more member states have special constitutional status, thereby creating different patterns of relations between individual member states and the central government.

3. [Expressions of opinion on a matter of law, given by a judge in court, but not essential to his decision and therefore not of binding authority.]

4. The British North America Act, 1940. In the *Employment and Social Insurance Act References*, the JCPC found unemployment insurance *ultra vires* in that it involved permanent legislation tailored to meet a special emergency whose suggested existence could not be judicially recognized whatever the time frame of the legislation.

5. The British North America Act, 1951. It is interesting to note that the old age pension scheme that constituted the immediate *raison d'être* for this amendment was financed by earmarked percentages on three federal taxes that could never have been deemed 'premiums'. However, the revenue so raised was paid into a special Old Age Pension Fund. This suggests that the limitation on the federal spending power is perceived to be such that even if money has been raised by taxation, it may not be spent for welfare purposes from a fund other than the Consolidated Revenue Fund. Federal family allowances, established by legislation in 1945, are demogrants exactly similar to old age pensions, but are paid from the Consolidated Revenue Fund. In this instance an amendment to the BNA Act was neither sought nor deemed necessary.

6. The British North America Act, 1964. This amendment permitted the federal government to institute the Canada Pension Plan (CPP), which is financed by compulsory contributions from employers and employees that are paid into the Canada Pension Plan Account. The CPP does not operate in Quebec, which has its own pension plan. The benefit structure of the CPP, which encompasses disability and survivor benefits, as well as old age pensions, required that section 94A be expanded by amendment. Since provincial unanimity was required to secure the amendment, the Government of Quebec had an important bargaining card in its pension negotiations with Ottawa.

7. In this regard it is to be observed that the application of the spending power to individuals has been stressed as the basis for the federal support of research in universities. Federal research grants are regarded as payments to individual scholars and scientists within universities, not as payments to institutions. That the federal government wishes to associate research support only with payments to individuals can be seen in the fact that the so-called 'general research grants' made by federal councils are disbursed in the name of university presidents rather than of the institutions that they head.

8. Anthony G.S. Careless, *Initiative and Response: The Adaptation of Canadian Federalism to Regional Economic Development* (Montreal: McGill-Queen's University Press, 1977), pp. 213–18.

9. See section 46 of the Victoria Charter.

10. Task Force on Canadian Unity, *A Future Together* (Ottawa: Minister of Supply and Services Canada 1979), p. 128.

11. Constitutional Committee of the Quebec Liberal Party, *A New Canadian Federation* (Montreal: 1980), pp. 53–54. (The Beige Paper.)

12. The Constitution Act, 1982; a resolution adopted by the Parliament of Canada, December 1981, section 36.

13. John A. Porter, *The Vertical Mosaic* (Toronto: University of Toronto Press, 1965), p. 366.

14. John F. Graham, "Community in Question," in *Transactions of the Royal Society of Canada*, Series IV, Vol. 16 (1978), p. 210.

15. Alan C. Cairns, "The Governments and Societies of Canadian Federalism," *Canadian Journal of Political Science* 10 (December 1977), p. 707.

16. Marcel Rioux, "Communities and Identity in Canada," and Northrop Frye, "A Summary of the Conference," both in *Options: Proceedings of the Conference on the Future of the Canadian Federation* (Toronto: University of Toronto Press, 1977), pp. 4–11 and pp. 435–38.

17. Samuel P. Huntington, "The Founding Fathers and the Division of Powers," in Arthur Moass, ed., *Area and Power* (New York: Free Press, 1959), p. 185.

18. Carl J. Friedrich, "Federal Constitutional Theory and Emergent Proposals," in Arthur MacMahon, ed., *Federalism, Mature and Emergent* (New York: Doubleday, 1955), pp. 510–33.

19. James Alexander Corry, "The Uses of a Constitution," in Law Society of Upper Canada, Special Lectures, *The Constitution and the Future of Canada* (Toronto: Richard DeBoo, 1978), pp. 1–15.

20. See text, pp. 369–70.

21. See text, p. 358.

22. Canada, Federal-Provincial Relations Office, *Federal-Provincial Programs and Activities, 1978* (Ottawa: Federal-Provincial Relations Office, 1978), p. 19.

23. *Ibid.*, p. 21

24. Donald V. Smiley, *Canada in Question: Federalism in the Eighties*, 3d ed. (Toronto: McGraw-Hill Ryerson, 1980), p. 54.

25. [That is, pertaining to a union of equal members who are not subordinate to any higher authority.]

26. The Beige Paper.

27. Thomas J. Courchene, "Avenue of Adjustment: The Transfer System and Regional Disparities," in Michael Walker, ed., *Canadian Confederation at the Crossroads; The Search for Federal-Provincial Balance* (Vancouver: The Fraser Institute, 1978), pp. 145–86.

28. *Ibid.*
29. Careless, *Initiative and Response*, p. 210.
30. *Ibid.*
31. "A Budget Paper: Equalization and Fiscal Disparities in Canada," *Ontario Budget, 1980* (Toronto: Ministry of Treasury and Economics, 1980), p. 22.
32. Task Force on Canadian Unity, *A Future Together*, p. 82.
33. See Corry, "The Uses of a Constitution."

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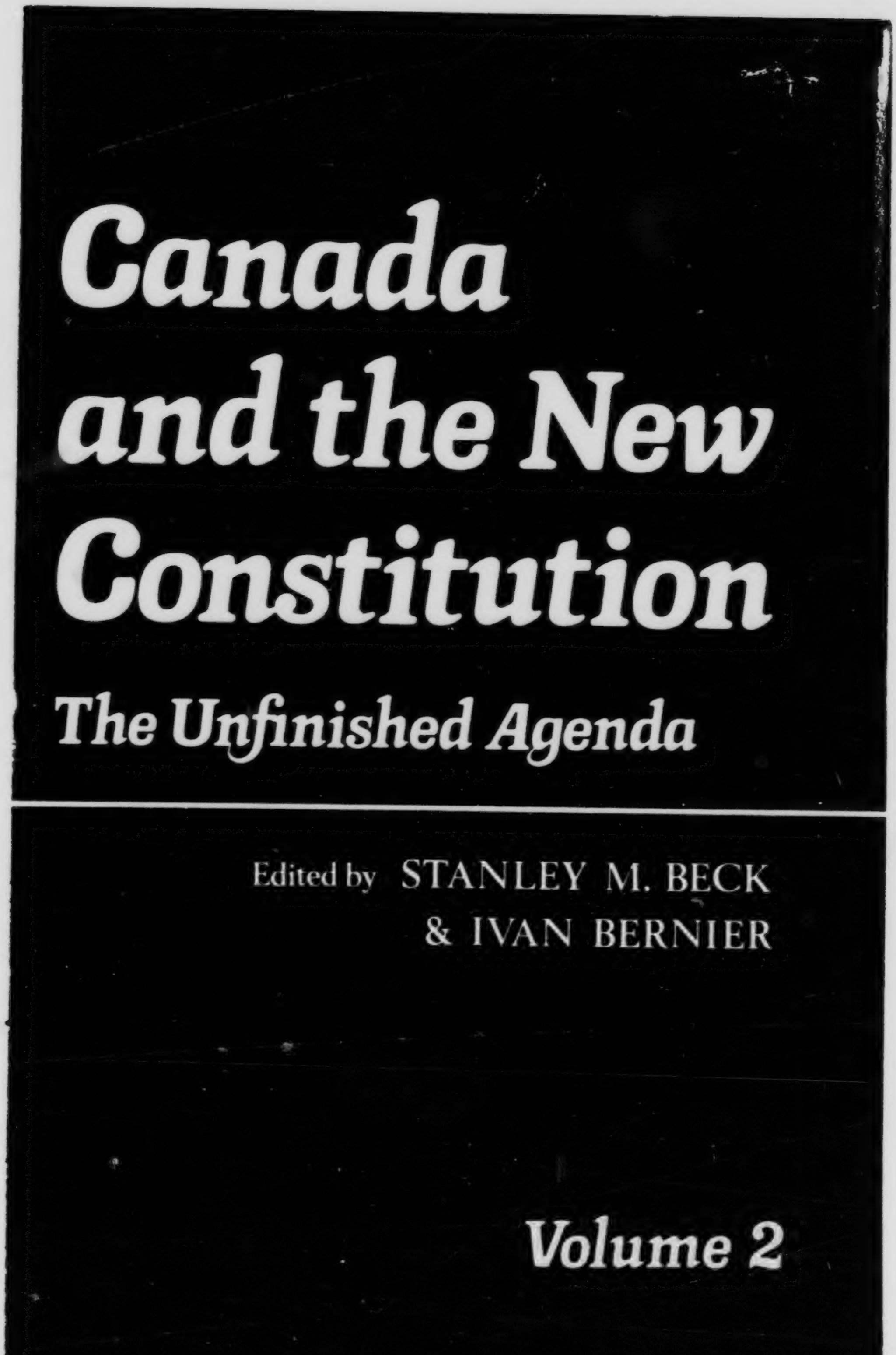

Canada and the New Constitution

The Unfinished Agenda

Edited by STANLEY M. BECK
& IVAN BERNIER

Volume 2

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Canada and the New Constitution

The Unfinished Agenda

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Energy and the Canadian Federation: Some Economic Aspects of Optional Constitutions

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Energy and the Canadian Federation: Some Economic Aspects of Optional Constitutions

Introduction

This paper attempts an economic analysis of the interprovincial distribution of costs and benefits of Canadian crude oil and natural gas, given optional forms of the new Canadian Constitution. Four optional constitutions will be considered. The first analysis will review how energy costs and benefits might be distributed in a federal state with a strong central authority that distributed all its energy-based revenues throughout the country on an equal per capita basis. The remaining three options consist of a federal state with enhanced provincial powers, as conceived by the Ryan proposals[1] that emphasized provincial rights to revenues from provincial natural resources; sovereignty for Quebec; and sovereignty-association for Quebec and Canada. In order to proceed with a quantitative analysis, I shall make some rather arbitrary assumptions about the energy implications of each of the three options that involve a decrease in federal authority.

The Ryan proposals imply little for the energy picture as Quebec has no major resources of oil and gas, and her very substantial hydro-electric resources are, for all practical purposes, already completely owned and controlled by the province. The most extreme interpretation of these proposals is that they would involve putting all energy resources into the hands of the provinces, and that all related pricing and trading decisions would be taken in the narrowly defined economic interest of the particular producing province(s). However, the Ryan proposals do include a continuation of the equalization-payments system, and these payments are greatly affected by provincial energy revenues.

Sovereignty for Quebec would entail handling oil and natural gas trade between Quebec and the rest of Canada according to the same pricing and tax provisions that govern energy trade between Canada and the United States. The same arrangement would also exist under sovereignty-association. The energy-related differences between sovereignty and sovereignty-association are, in fact, difficult to guess. One way of hypothesizing such a difference might be to assume that, relative to the United States, Quebec would enjoy preferred access to Canadian oil and gas. Since world-level prices would presumably be charged under both options, the difference between the two arrangements would lie, from Quebec's point of view, in the extra security of supply provided by sovereignty-association. The value of this extra security is difficult to establish, and it is, moreover, rather uncertain that such a special arrangement would be negotiated for Quebec under sovereignty-association. Thus, in the end, our analysis will make a relatively small distinction between the options of sovereignty and sovereignty-association for Quebec.

Techniques and Limitations

In setting up an energy-demand model, we have selected five regions within Canada and four types of energy resources: electricity, coal, crude oil, and natural gas. The production, costs, revenues, and calculation of consumer surpluses are treated in detail only for crude oil and natural gas. This limitation does not pose great problems for the analysis of constitutional changes since, so far, there is little interprovincial trade in thermal coal, and most provinces have independent systems for the generation and distribution of electricity. Thus the inability to calculate the net economic benefits of each province's hydro-electric resources, to take one example, does not much affect the analysis of constitutional change because under three of the options (excepting that of increased federal authority), the net benefits would, in any event, remain in the province where the electricity is generated.

The allocation of consumer surpluses among regions follows quite easily from the regionally based demand model and an accounting procedure that allows for interprovincial transport costs and for especially low prices in energy-producing regions. Since the Prairies are treated as one region in the demand data, and since prices differ in the three Prairie provinces, the allocation among the three is necessarily rather imprecise. The allocation of provincial revenues among the producing provinces is proportionate to the 1976 foreign ownership ratios (amounting to almost 80 per cent) in Canadian oil and gas production. The allocation of the Canadian producer surpluses among provinces raises severe problems. For one thing the distribution of final equity interest by province is not known. Even if this distribution were known, the prices paid for those interests would not be known, and so it would be impossible to tell to what extent economic rents were being obtained by shareholders in each province. In face of these difficulties, the simplest assumption may well be the most defensible: that is, an equal per capita distribution of these equity interests across the country. This assumption undoubtedly understates materially the Alberta per capita ownership, although the results suggest that the net effect on the provincial figures is relatively small.

The issue of energy-supply security or self-sufficiency will be roughly dealt with by calculating the extent to which each of the main regions relies on energy imported from the rest of Canada or from the rest of the world. Total measures for Canada can be calculated, and these differ depending on whether or not Quebec is included as part of Canada. These estimates of foreign and interprovincial dependence naturally differ over time; for this reason, some indication will be given of their past and future trends.

In analysing costs and benefits, should one assume that the optional constitutions have always been in place, or that the new options are to be taken up in 1980 or later? One of the interesting features of the quantitative results is that the accumulated costs and benefits to Quebec were just about in balance in 1980, so that it does not matter which calculation procedure is used. In considering the various constitutional models, it will be assumed that the new régimes started in 1980.

Some Estimated Results under the Existing Constitution

Table 1 shows the distribution by region of the net economic benefits under two different pricing strategies for Canadian crude oil and natural gas. In all of these variants, the existing constitutional powers and tax systems remain unchanged. The results of the 'federal pricing' case involve some guesses about the possible evolution of energy prices under the Liberal government elected in February 1980. The price for domestic crude oil increases by $3.00 per barrel per year towards an ultimate price of $30.00 per barrel (in 1980 Canadian dollars) for conventional crude oil production; natural gas is priced to the users at 85 per cent of British thermal unit (Btu) equivalence (in central Canada) to the delivered price of Canadian conventional crude oil. Moreover it is assumed that domestic users of crude oil will start paying directly to support the cost of the continuing subsidy on oil imports, following the same system as that already in use to support the subsidy on synthetic oil. The 'provincial rights' case involves an average 1980 well-head price of $19.75 per barrel, that is, $5.00 above the price in February 1980, and subsequent annual increases of $10.00 per barrel until equality with world prices is achieved early in 1983. It was assumed that the world price itself would start at about $35.00 (Canadian) per barrel in 1980 and would rise thereafter at the rate of 2 per cent per annum in real terms. Other key assumptions are spelled out in the notes for Table 1.

The top-line figures in each block of Table 1 show the discounted total net values of total economic rents, in billions of end-1980 dollars, accruing to the residents of each province or region. In the second line of each block, these same economic benefits are divided by population and shown as thousands of dollars per capita. The first block of the table shows the probable figures under the policy that the federal government was expected to propose. This policy differed in three important respects from the policy I described in an earlier paper as the 'Federal Liberal' case.[2] The annual 'per barrel' price increases were set at $3 rather than $2; the target for the well-head price of Canadian conventional crude oil was set at $30 (in constant 1980 Canadian dollars) rather than $25; and a phased introduction was planned of a 'per barrel' levy on final consumers of oil products between 1980 and 1985. This levy is large enough to finance entirely, by 1985, the subsidy on imported oil. This last change is by far the most important of the three for improving the federal government's fiscal position.

The second block reflects a phased move toward world prices for Canadian crude oil, with a discount of 5 per cent (relative to Btu equivalence to the world price of crude oil) on natural gas export prices, and 5 per cent (relative to Btu equivalence to the domestic price of crude oil) on natural gas sold for domestic use. This level of discount, it is assumed, will be voluntarily adopted by the producing provinces to obtain a larger market for their natural gas. The results shown in Table 1 are based on the assumption that natural gas exports are, in the 'federal' case, equal to the amounts approved by the National Energy Board and the federal government in late 1979. In the 'provincial rights' case, the levels of natural gas exports from Alberta and British Columbia to the United States are assumed to be larger than those so far approved by the National Energy Board by 7.5 trillion cubic feet (tcf), comprising .5 tcf of additional exports in each year from 1986 to 2000 inclusive.[3]

It is apparent from the Table 1 results for the existing system that even with the gradual movement to an oil price that is less than the world level, the distribution of economic rents among provinces is sharply uneven.[4]

Energy Pricing and Policies in a Federal State with Strong Central Authority

The figures for total Canadian rents per capita in Table 1 can be compared with the province-by-province figures to show the differences between the existing system and what might happen in a federal state with strongly centralized powers. Under such a system, a citizen's province of residence would not affect the amount of net benefits that he or she would receive; at a rough estimate, therefore, we could say that each Canadian would receive net benefits at the national per capita-average level.[5]

What sort of pricing policy would likely be established in a federal state with strongly centralized powers? One might argue that the primary purpose of low prices for crude oil and natural gas in the current Canadian system is to transfer more of the benefits accruing from Alberta to other provinces. Hence, in a strongly centralized state, one might expect to find higher prices imposed to obtain more efficient energy use that, in turn, would produce a larger 'pie' to distribute. However, the figures in

Table 1: **Regional Economic Rents[a] from Conventional Crude Oil and Natural Gas under Optional Constitutions**

(Present values in millions of end-1980 dollars and in thousands of end-1980 dollars per capita)

		Canada	*Atlantic Provinces*	*Quebec*	*Ontario*	*Manitoba*	*Saskatchewan*	*Alberta (and NWT)*	*British Columbia (and Yukon)*
1. 'Federal Pricing' Case									
Domestic oil prices up $3/yr to 1990, then move towards $30/barrel in 1980 prices. Natural gas at 85% of Btu parity with domestic oil. Import subsidy gradually becoming self-financing.	(a) Total rents	393	18	56	93	9	20	154	33
	(b) Per capita	16.6	7.9	8.8	10.9	9.3	21.0	80.0	12.5
2. 'Provincial Rights' Case									
Domestic oil prices move up $10 per barrel per year to 100% of world price. Natural gas at 95% of Btu parity. 7.5 tcf additional natural gas exports 1986 – 2000.	(a) Total rents	381	14	41	58	8	22	204	34
	(b) Per capita	16.1	6.4	6.5	6.8	8.2	22.9	99.4	13.3

Note:

a. All economic rents are present values of all past and future costs and returns, measured at the end of 1980.

Assumptions Applicable to the Results Reported in Tables 1 to 3

1. World oil price equals US$30.00 (C$35.10) per barrel in 1980, rising thereafter at 2% per year in real terms until the end of the century; after the turn of the century, it is constant in real terms. This price is about the middle of the range of OPEC prices at the end of January 1980 if one adds the Energy, Mines and Resources' estimate of US$1.69 for ocean transport and delivery charges to Montreal.

2. In the 'federal pricing' case, the producers of conventional oil receive an average well-head price of $16.25 per barrel (equal to the 1 January price of $14.75 plus 50% of $3) in 1980, $19.25 in 1981, $22.25 in 1982, and so on until 1990. After 1990, the price is adjusted to close 10% of the gap between its (inflation-adjusted) value in the previous year and the 'target price' of $30 per barrel (1980).

In the 'provincial rights' case, the producers of conventional oil receive an average well-head price of $19.75 per barrel in 1980, $29.75 in 1981, $39.75 in 1982, and the world price in and after 1983.

3. Natural gas for domestic users (at the Toronto city gate) is priced, in the 'federal' case, at 85% of Btu equivalence to domestic crude oil delivered to Toronto, and at 95% in the 'provincial rights' case. Prices elsewhere reflect differences in transport costs and lower prices to users in B.C. and Alberta. Under all the constitutional options, the natural gas prices gradually move towards 100% of Btu parity as the time approaches when Canadian demands are expected to exceed supply from non-frontier sources.

4. Natural gas for export sale is priced at 95% of Btu equivalence to world crude oil, less costs of delivering natural gas from the Canadian border to Chicago. This price is calculated to stand at C$5.54 per million cubic feet (mcf) or US$4.74 mcf in 1980, and to rise thereafter at 2% per year in real terms. This 1980 price is 6% more than the US$4.47 mcf price that came into effect on 17 February 1980.

5. The general rate of inflation was assumed to be 7.5% in 1980 and 6% thereafter. Real Gross National Expenditure was assumed to grow at 4.2% annually from 1979 to 1990 and at 3.2% thereafter.

6. The nominal discount rate used is equal to the assumed rate of general inflation from 1980 onward, plus 7.44%. (The actual rate is used prior to 1980.) The latter figure, which is a calculated average real alternative supply price of capital to Canadian business, is also used as the after-tax opportunity cost on invested capital when calculating net economic rents to producers. Economic rents to governments are net of an income-tax opportunity cost equal to 3% of capital invested. Total rents to the resource are net of a real capital-rental charge equal to 7.44% + 3% = 10.44% of the undepreciated capital.

7. Production of synthetic crude oil from the Alberta oil sands is set exogenously, and the assumption is made that three more plants will have been added to the present two by the end of the century. These additional plants come on stream at four-year intervals, starting in 1986. In all cases, the price of refined oil products consumed in Canada is adjusted to include (over and above the crude oil prices described below) a 'per barrel' charge known as the 'Syncrude levy'. This is set large enough in each year to cover the difference between the world price and the domestic price on all output from oil-sands plants. Under current arrangements, all output from these plants is guaranteed a market at world prices. The size of the Syncrude levy naturally differs depending on the domestic price of crude oil. Given the assumed 'federal pricing' strategy, it is roughly $2.50 per barrel in 1985; given the 'provincial rights' pricing policy, it is zero in 1985 because the Canadian price reaches the world level by 1983.

8. The division of economic rents among provinces is based on oil and gas consumption for the consumer rents, production for provincial government revenues, and population for the Canadian share of producer rents. The distribution of federal revenues among provinces, in Tables 1 and 3 is based on the average federal tax payments by taxpayers in different provinces. The exogenous weights are used as follows:

	Population (mid-1979)	*Production of Crude Oil*	*Production of Natural Gas*	*Federal Tax Collections*
Atlantic Provinces	.0948	—	—	.0596
Quebec	.2660	—	—	.2360
Ontario	.3590	—	.028	.3867
Manitoba	.0436	.008	—	.0360
Saskatchewan	.0404	.107	.022	.0337
Alberta & N.W.T.	.0867	.855	.820	.1201
British Columbia and Yukon	.1095	.030	.130	.1279

9. Natural gas exports in the 'federal pricing' case include the 3.75 tcf of new exports for 1980 to 1987, approved by the National Energy Board in December 1979. In the 'provincial rights' case the level of natural gas exports is increased an additional .5 tcf per year from 1986 to 2000 inclusive. Thus additional exports are used to (more than) offset the reduction in domestic natural gas sales caused by the rapid move towards world prices for crude oil and natural gas.

Table 1 actually show that average economic rents to Canadians are higher when energy prices are lower, as in the 'federal pricing-policy' case, than when they are higher, as in the 'provincial rights' case. Why is this? It is because about 80 per cent of the equity interest in the oil- and gas-producing firms is foreign owned; therefore, while higher energy prices cut the wasteful use of energy, they also lead to a greater 'leakage' of the benefits outside the country. Naturally the extent to which these factors are offsetting — and hence provide the 'best' pricing strategy in a strongly centralized federation — depends on the efficiency of the tax and royalty systems, the degree of foreign ownership in the oil and gas industry, the impact of energy prices on energy demands, and the degree of import dependence.[6] Table 2, which shows the distribution of economic rents to producers, consumers, and governments under the optional régimes, illustrates more clearly than Table 1 the offsetting effects of foreign ownership and economic waste. Table 2 also makes it easier to compare the analysis in this paper with the conclusions reached in earlier papers.

Given either of the pricing strategies examined in this paper, Quebec residents would be about twice as well off under a more centralized federal system than under the current system. It must be emphasized, however, that a system more centralized with respect to oil and gas revenues would no doubt entail similar centralization for other natural resource revenues, and Quebec has higher than average per capita endowments of metallic minerals, forests, and especially hydro-electricity.

On the other side of the coin, Alberta residents would, on average, receive economic rents less than one quarter as large if the benefits of oil and natural gas were spread equally among all Canadians. However, a more centralized state would involve some redistribution to Alberta of the economic benefits of the hydro-electric energy resources of Quebec.

Energy in a Less Centralized Federation

The second group of figures in Table 1 illustrates the distribution of net benefits if more weight were given to the pricing preferences of the producing provinces, especially Alberta. The model has not been rerun to show what would have happened if a more producer-oriented price had been applied ever since 1973, but rather involves fairly rapid price increases starting in 1980.

Table 2: Net Economic Rents from Conventional Crude Oil and Natural Gas under Optional Constitutions

(Billions of end-1980 Canadian Dollars)

		Total Rent (1)	All Producers (2)	Canadian Consumers (3)	After Waste of (4)	Federal Government (5)	Provincial Government (6)	Total Canadian Rents (7)
1. 'Federal Pricing' Case								
Domestic oil prices up $3/yr to 1990, then move towards $30/barrel in 1980 prices. Gas at 85% of Btu parity.	Oil	201	23	86	8	15	76	183
	Gas	243	24	96	58	29	80	209
	Total	444	47	182	64	44	156	392
2. 'Provincial Rights' Case								
Domestic oil prices move up $10 per barrel per year to 100% of world price. Gas at 95% of Btu parity. 7.5 tcf additional gas exports 1986–2000.	Oil	225	51	36	4	34	104	185
	Gas	246	42	35	16	43	109	196
	Total	471	93	71	20	77	213	381

Notes:

The assumptions are set out in the Notes to Table 1.

Meaning of columns: Column 7 is the sum of 3, 5, 6, and 21.5% of column 2, where 21.5% was the value estimated in 1976 as the Canadian equity-ownership proportion in non-frontier natural gas and crude oil production.

A less centralized control over resource production and pricing, such as that illustrated in the bottom part of Table 1, seems consistent with the constitutional position paper of the Quebec Liberal Party, 1980.[7] However, the Quebec Liberal position ('the Ryan proposals') also places considerable emphasis on maintaining the federal equalization-payments system: "The constitution should oblige the central government to maintain tax equalization and regional development programs."[8]

Table 3 shows the net impact of the current equalization-payments system, established by the 1977 Fiscal Arrangements Act,[9] as applied to 50 per cent of provincial conventional oil and gas revenues in and after 1980. The current system has been regularly 'doctored' so that Ontario would not join the Atlantic provinces, Manitoba, and Quebec as a 'have-not' province. Only the 'have-not' provinces receive equalization payments, which are financed out of general federal revenues. Thus the main effect of the large oil and gas revenues in Alberta is to give rise to payments from the federal government to the 'have-not' provinces. Note that Quebec gains more — and Ontario residents pay more — equalization payments under the 'provincial rights' case than under the 'federal pricing' case, although these equalization gains to Quebec are only about one third as large as the adverse effects of higher oil prices on Quebec indicated in Table 1. In any event Table 3 shows that the current equalization system is so uneven in its redistribution of oil and natural gas revenues that it is likely to be overhauled. Thus the especially favourable treatment of Quebec under the current equalization-payments system could not safely be regarded as a permanent feature of Canadian fiscal arrangements.

The Alberta position is about 25 per cent better under the 'provincial rights' case than under the 'federal pricing' case. The difference is relatively modest because both the 'federal pricing' and 'provincial rights' price levels are far above the average costs of production, and both cases reflect the same prices prior to 1980. This suggests that although the two cases reflect substantially different constitutional models, they both involve increases of the same extent in Alberta's position relative to that of the rest of Canada. Some major change in equalization or taxation would be required to alter that result, and earlier studies[10] indicate that most of the tax changes that have been discussed would not be large enough to shift the basic pattern very dramatically.

Table 3: The Effects of the Current Equalization-Payments System Applied to Provincial Revenues from Crude Oil and Gas

(Net present values of all future receipts minus payments, measured in billions of 1980 Canadian dollars)

	Federal Government	*Atlantic Provinces*	*Quebec*	*Ontario*	*Manitoba*	*Saskatchewan*	*Alberta*	*British Columbia*
1. 'Federal Pricing' Case								
Domestic oil prices up $3/yr to 1990, then move towards $30/barrel in 1980 prices. Natural gas at 85% of Btu parity with domestic oil. Import subsidy gradually becoming self-financing.	−21.0	3.7	8.9	−8.1	1.5	−.7	−2.5	−2.7
2. 'Provincial Rights' Case								
Domestic oil prices move up $10 per barrel per year to 100% of world price. Natural gas at 95% of Btu parity. 7.5 tcf additional natural gas exports 1985–2000.	−37.8	5.7	13.8	−12.7	2.3	−1.1	−3.9	−4.2

Notes:

The weights used to allocate receipts and payments are listed in the Notes to Table 1.

The numbers shown under the federal government are the present values of all future equalization payments under the current system with 50% equalization of oil and gas revenues. The present values for each province include, as negative components, the present values of the additional federal taxes levied on their residents to finance the equalization payments.

Sovereignty for Quebec

The simplest definition of pure sovereignty consists of the statement that Quebec residents would get no further economic rents from Western Canadian oil and gas beyond the limited extent to which Quebec residents held shares in producing firms that received some part of the net producer rents. Without some preferred trade access to Canadian oil and gas, Quebec's energy self-sufficiency would drop to the proportion of final energy obtained from hydro-electricity (which in our model is about 25 per cent in 1980) and would rise to about 35–40 per cent in 1990 in the world-price 'provincial rights' case shown in Table 1. The present value of all future net monetary losses to Quebec residents would be about $9000 (1980) per capita in the 'provincial rights' case.[11] There would also be none of the oil-induced equalization payments shown in Table 3. It would be appropriate, too, to attach some value to the reduced security of supply, although to estimate the relevant amount is next to impossible.

Sovereignty-Association for Quebec

As I mentioned in my introduction, it is very difficult, in the context of the energy model, to distinguish the implications of sovereignty-association from those of sovereignty. Sovereignty-association would presumably involve for Quebec some form of preferred access to Canadian crude oil and natural gas, with the latter probably becoming more important in the course of time. But within our model calculations there is no straightforward way of attaching a value to this preferred access even if the sovereignty-association documents were more precise about the way in which the relationship would apply to crude oil and natural gas. If Canadian oil and natural gas used in Quebec could be regarded as 'Quebec energy' for the purpose of calculating energy self-sufficiency in that province, then measured self-sufficiency for Quebec would be much higher under the sovereignty-association option than under the sovereignty option.

Viewing sovereignty for Quebec from the standpoint of the rest of Canada, average per capita economic rents would rise by about one third; this increase would reflect the concomitant 25 per cent drop in Canada's population. Similarly Canada's degree of energy self-sufficiency would rise substantially. The only remaining imports would be of American coal to Ontario and offshore crude oil to the Atlantic provinces. Secure Quebec markets for natural gas might be of some value to Alberta.

Conclusion

It is clear that many of the constitutional options that differ distinctively in their political significance have energy implications that are difficult to assess. Even where I have tried to provide some rough measures of the approximate distribution of net economic benefits under optional constitutional arrangements, the calculations can be treated only as very rough guides to the complicated and hard-to-predict political and economic linkages among Canada's regions. Some would argue that such calculations are better not made, in any case, as they may increase, rather than decrease, the difficulties involved in reaching mutually acceptable compromises between West and East, and between Quebec and the rest of Canada. That may be so, although I hope that it is not. In any event the calculations that have been reported in this paper have shown that the 1973–74 and 1979 changes in world energy prices have been so large that they have materially changed the balance of energy benefits under the various constitutional options. The role of Alberta can never again be seen as it was before 1973. The large size and uneven distribution of Canada's energy resources have been major causes of provincial demands for constitutional change. Energy resources, whether the oil of Alberta and Hibernia or the hydro-electricity of Quebec and Labrador, also provide, by their very richness, one of the key impediments to agreement about the ways in which economic powers and revenues are shared within the federation.

Notes

1. Constitutional Committee of the Quebec Liberal Party, *A New Canadian Federation* (Montreal, 1980). (Referred to as 'the Ryan proposals'.)

2. J.F. Helliwell, "The Distribution of Energy Revenues Within Canada: Functional or Factional Federalism?" PNRE Resources Paper #48 (Vancouver: University of British Columbia, Department of Economics, February 1980).

3. The issues involved in natural gas exports are described in J.F. Helliwell, "Trade Policies for Natural Gas and Electricity," in Ontario Economic Council, *Energy Policies for the 1980s: An Economic Analysis* (Toronto, 1980), vol. II, pp. 1–39.

4. In an earlier paper (see note 2), I examined one of the pressures that those disparities are likely to create for Confederation and illustrated the inadequacies of the current system of equalization payments (the effects of which are not included in Table 1 figures) for righting these imbalances. The special position of Quebec in the current equalization-payments system is further discussed on pp. 11 – 14.

5. The actual situation would probably be more complicated than this conclusion suggests. For example, as long as a substantial proportion of the benefits would pass to consumers by means of lower-than-world-level prices, some fiscal devices would be required to pass equivalent amounts to Canadians without access to domestic natural gas. This would be especially so for Eastern Quebec, the Atlantic provinces, and various parts of other provinces.

6. J.F. Helliwell *et al.*, "The Interaction of Tax Policy and Energy Policy," in *Report of Proceedings of the Thirty-first Tax Conference* (Toronto: Canadian Tax Foundation, 1979). Also PNRE Resources #47. (Vancouver: University of British Columbia, Department of Economics.)

7. The 'Ryan proposals', especially pp. 95 – 96.

8. *Ibid.*, p. 75.

9. Thomas J. Courchene, *Refinancing the Canadian Federation: A Survey of the 1977 Fiscal Arrangements Act* (Montreal: C.D. Howe Institute, 1979).

10. For example, Helliwell, "The Interaction of Tax Policy and Energy Policy."

11. These numbers can be read directly from Table 1 because simulation results not shown here suggest that until 1980 the federal tax reductions to the oil industry indirectly paid for by Quebec taxpayers have matched almost exactly the 1980 value of the import subsidies received between 1974 and 1979.

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Petroleum and Natural Gas and Constitutional Change

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Petroleum and Natural Gas and Constitutional Change

Introduction

The paper that follows consists of three major sections. The first outlines the present constitutional framework as it relates to the petroleum and natural gas industry. The traditional areas of jurisdiction of both the provincial and federal governments are considered in light of the British North America (BNA) Act and custom. The second portion of the paper discusses the federal perspective with respect to oil and gas management and generally advances a brief for increased central control over the exploitation of these resources. The final portion examines the prospects for varying the existing formal constitutional division of jurisdiction in a fashion that results in increased, rather than reduced, provincial control. Some of the earlier efforts in this direction are also considered here.

The Basic Constitutional Division of Jurisdiction

Present regulatory controls that apply to the petroleum and natural gas industry are as much the product of the unique history of the industry as they are the result of a strictly followed division of jurisdictional competence under the BNA Act. In respect to the formal constitutional legalities, there is little doubt about the 'ownership' of natural resources. Section 109[1] of the

BNA Act confirmed that ownership over natural resources would remain vested in the original provinces party to the new Confederation of 1867. This control over indigenous resources was later extended to the Provinces of Alberta, Saskatchewan, and British Columbia. Thus any limitations that may exist on provincial control can only be those that derive from the division of legislative power between the federal and provincial governments. There can be no serious debate about which jurisdiction has 'ownership' *qua* 'ownership'.

While there is little doubt about the ownership question, it is a mistake to proffer ownership as the answer, in principle, to the so-called 'resources struggle' that now goes on between the provinces and the central government. Far from quelling debate, the very term 'ownership' can be seen on examination to raise more questions than it answers. Just as private ownership of property rarely facilitates unlimited powers of retention or disposition, so provincial 'ownership' cannot be divorced conceptually from the correlative federal power to regulate in a number of areas that will have a substantial effect on the resource sectors. It is, in other words, necessary to qualify the term 'ownership' in order to appreciate fully its constitutional significance to the provinces. Most of the property held in the provinces is owned by private individuals rather than the Crown in right of a particular province. Where this is so, the province merely enjoys a legislative capacity to control, limit, and perhaps even eliminate the rights of ownership vested in private individuals. Nor, as we shall shortly see, is this legislative power exclusive. Thus the statement that provinces have control over property can usually be taken to mean no more than that provincial legislation is the common source of resource control rather than the exclusive source. The major exception to all of this relates to Crown reserves; this subject will be explored more fully in the paragraphs that follow.

The provisions of the BNA Act that govern provincial legislative authority over primary resources include sections 92(5),[2] 92(13),[3] and 92(16).[4] Section 92(5) is central to the management and sale of public lands that belong to the province and is of pivotal importance today. In the Province of Alberta approximately eighty per cent of petroleum and natural gas is produced from public lands. While these lands lie within the exclusive legislative control of the province, they also belong in a proprietary sense to the Crown in right of Alberta. Thus Alberta acts with the dual capacity of a proprietor and a legislator, exercising provincial power whenever oil and gas production occurs within the province. As a proprietor, the province has 'disposed'[5] of its property interest in the produced petroleum and natural gas through the principles of ordinary contract when a lease is made. Yet these agreements have also been made subject to a legislative framework passed under the authority of section 92(5), which generally governs petroleum and natural gas production and thus appears to preserve for the province a measure of continuing discretion over the conditions that govern oil and gas production.

Sections 109 and 117 of the BNA Act coupled with Resources Transfer Agreements have been viewed by the producing provinces as effectively 'entrenching' the property interests of the Crown in right of the province. In advancing this view the provinces are asserting a principle of interjurisdictional immunity in respect to Crown land that would effectively bar almost all federal regulatory power.[6]

Section 92(13) contains the general provincial jurisdiction over property and civil rights. It is this head of jurisdiction that has been used as the traditional support for the oil-producing provinces' enactment of generic regulatory controls that affect most phases of the petroleum and gas industry, whether the production is from Crown or private lands. The exercise of provincial authority in this field is ultimately constrained by the federal government's jurisdiction over interprovincial and international trade and commerce. But there is, by virtue of section 92(16), apparent jurisdiction over matters of local or private significance; this jurisdiction would seem clearly to apply in relation to petroleum and gas both produced and consumed within a single province.

The paragraphs above present the broadest jurisdictional constraints that affect the producing provinces. By way of contrast, the central government's technical jurisdiction over the oil and gas industry arises as an extension of its general power with respect to the regulation of trade and commerce pursuant to section 91(2),[7] its power of taxation with respect to section 91(3),[8] its general jurisdiction under section 92(10)(a)[9] with respect to "Works and Undertakings" connecting a given province with any other or extending beyond its own limits, its declaratory power under section 92(10)(c)[10] with respect to "Works" that are considered to be for the "general Advantage of Canada," and perhaps most important, the central government's residual jurisdiction under the opening paragraph of section 91, with respect to laws for the "Peace, Order and good Government of Canada."[11] While the precise scope of each of these heads of power may involve a substantial amount of judicial controversy, the point would nonetheless seem apparent that the federal government has indisputably pre-eminent control over the terms and conditions under which oil and gas can flow out of the province of production to the national and international markets.

Oil and Gas Management: The Federal Perspective

The Historical Sharing of Jurisdiction

The early history of the petroleum and gas industry was not notably marred by a great deal of constitutional conflict. If anything can be said, it would seem that both the federal and provincial governments shared a concern that the development of the industry should be encouraged. Indeed the health of the industry became a preoccupation that appears to have displaced the giving of much serious attention to the potential for subsequent jurisdictional conflict.[12]

Canada's experience with the petroleum and gas industry began far earlier than in most contemporary producing countries. About the turn of the century, there was a minor flurry (by today's standards) of activity in Southwestern Ontario. Indeed the continent's first oil discovery was in Canada; the first refining process was developed by a Nova Scotian; and the first commercial gas strikes were made in Essex and Haldimand Counties in the Province of Ontario.[13]

Much of our early natural gas production was exported to the United States, a fact that later led to premature shortages and field abandonments. The hardships connected with this experience, coupled with the later and perhaps equally difficult problems over the sharing with the United States of power generation from the Niagara River, led Canada to impose harsh legislative restrictions against the future exportation of oil, natural gas, and electrical power.[14]

A number of factors combined to modify this otherwise rigid prohibition. Before the widespread development of oil and gas activity, the Albertan economy depended mainly on agricultural output and the stability of agricultural markets. Throughout this period federal support was of substantial importance and, indeed, equalization payments continued to be made to Alberta until 1973. More economic diversification in the Western regions was thus desirable from the point of view of the federal government and the Western provinces alike. For this reason the early discoveries in the Turner Valley and at Leduc animated hopes, both nationally and provincially, that the economic growth rate of Western Canada might well be about to experience a classic 'take-off'.[15]

During the early phases of the petroleum and gas exploratory play in Western Canada, there was concern that the industry's growth might be hamstrung by the relative immaturity of the small and distant domestic market. Alberta in particular was concerned to see that the initial markets for its petroleum and gas were growth oriented and capable of sustaining an orderly acceleration of production capability. The American markets were larger than Canada's and closer. Initially, at least, it seemed apparent that Western crude would not be able to compete with the relatively cheaper offshore imports that were being used by the urban industrial markets of Southwestern Ontario and Montreal.

A range of factors moved the federal view of the desirability of petroleum and gas exports into line with that of the Western provinces. The main consideration appears to have related to continental defence. Canada had entered North American Air Defence Command (NORAD) and with the United States shared a common concern that the continent as a whole have land-based sources of energy supply available in the event of offshore naval hostilities or political instabilities in those countries from which petroleum was being imported. The Suez crisis of 1957 and the earlier Korean war heightened the level of federal concern on this point.

Thus the mid-1950s saw both the federal government and the Western provinces agreeing that Western petroleum and natural gas production should enter sizeable export markets in addition to domestic markets. In addition both levels of government were concerned that pricing decisions should be made with a view to the need to increase export-market sales. Finally, both levels of government were anxious to stimulate private investment in the industry and were thus prepared to make generous allowances for the industry in the federal taxation structure and through the establishment of generous provincial royalty rates.

This early partnership of the provinces, the federal government, and the industry was advanced, first, by federal support for the Trans-Canada pipeline project that opened up the natural gas-market regions of Toronto and Montreal, and later by the 1961 National Oil Policy. The federal government in effect guaranteed a domestic outlet for Western oil and gas, despite the fact that Western crude and natural gas were not competitive with alternative offshore petroleum imports. Central to the National Oil Policy, in particular, was the principle of so-called 'self-sufficiency'; under this principle Western Canadian oil production was artificially brought up to — and, indeed, at one point exceeded — the total national demand. The difference between national production and domestic consumption was arbitrarily labelled 'surplus' and exported to the United States.

By way of summary it should be stressed that a number of significant common interests underlay the early co-operation between the federal government and the oil- and gas-producing provinces. First, both levels of government wanted to increase the pace of economic activity in the Western part of the country. The petroleum and gas industry was a potentially significant employer and could ultimately prove to be an important source of both federal and provincial revenue, and a valuable source of foreign exchange if Canada's export potential should live up to industry estimates. While other matters such as defence and the diversification of the domestic energy supply were more or less exclusively the concern of the federal government, they happily coincided with Western ambitions for production. The evaluations by both levels of government of the long-term potential of the country as a petroleum producer were maintained at very high levels by the seemingly unbridled optimism from within the ranks of the 'experts' of the oil and gas industry. Thus neither the producing provinces, particularly Alberta, nor the federal government saw a need for the aggressive protection of domestic consumers against future cost increases or potential shortages. Rather, history indicates that both levels of government believed that Canada's principle difficulties lay in finding ever larger markets for domestic oil and gas production in the name of creating the necessary incentives for private industry to prove our country's purportedly vast potential as a 'world-scale' producer. Any controversy about the appropriate division of economic rent between the federal and provincial levels of government was put aside in favour of providing the maximum stimulus to the private sector. Ill-considered taxation or royalty burdens that might impair the development of the industry and the industry's markets were more substantial concerns than the possibility of forfeiting significant economic returns. Thus, during this early era, friction over the revenue sharing between the provinces and the federal government was a rare occurrence.

During the period before the early 1970s, Canada experienced no constitutional controversies: the provincial and federal governments shared control over the petroleum and gas industry. The federal government, as a result of its power over trade and commerce, had assumed regulatory control over the pipeline infrastructure that connected Alberta, British Columbia, and Saskatchewan with American and Eastern Canadian markets.[16] Indeed, in many respects, Ottawa acted as a marketing agent for the producing provinces by actively promoting the growth of export and domestic markets. This function was encouraged by both the producers and the producing provinces. Ultimately, in 1959, the National Energy Board (NEB) assumed over-all federal jurisdiction.[17] The NEB itself sprang from the primary recommendation of the Borden Royal Commission Inquiry[18] that had been established to sort out a series of industry-related controversies; these included the financing of the Trans-Canada pipeline project and concerns about the volumes, terms, and pricing arrangements relating to the export of natural gas to the United States.[19]

The Emergence of Constitutional Conflict

The relative harmony between the different levels of Canadian government came to an abrupt end partly as a result of the actions of the Organization of Petroleum Exporting Countries' (OPEC) First Ministers in 1973.[20] It would be too much of a simplification to assume that OPEC was alone responsible for Canada's increased domestic intergovernmental tensions. Indeed, prior to the October War in the Middle East, there had been a number of indications that control over petroleum and natural gas would soon become a growing source of friction. In 1972 Alberta commissioned a comprehensive review of royalty structures applying to its natural gas and an exhaustive survey of field-gas prices throughout the province.[21] The province's underlying purpose was simply to increase the amount of revenue that was paid into the provincial treasury from the industry.

It was also a busy year for the federal regulators. In 1972 the NEB published an analysis outlining what it described as "potential limitations" on Canada's petroleum supplies.[22] The analysis was, in fact, by today's standards, overly optimistic. But in 1972 it represented a dramatic reversal of thought about Canada's potential as a petroleum producer over the longer term. For the first time limitations on domestic supplies were acknowledged, and the possibility of adverse production-cost trends was identified as a concern.

In short the decisions of OPEC in late 1973 undoubtedly caused Canada to come to terms with potential issues relating to petroleum supply and price rather more quickly than the country would otherwise have done. Nonetheless, the present controversy over petroleum and natural gas has been shaped by actual, rather than artificial, limitations on both domestic and international supply. We shall discuss this subject in the paragraphs that follow.

Regulatory Tensions with the Producing Provinces: A Federalist Viewpoint

A number of tensions of constitutional importance have evolved between the producing provinces and the federal government over the interval between 1973 and 1981. First is the issue of which level of government should be entitled to establish the market price for domestically produced oil. The producing provinces, while not initially advocates of the domestic adoption of the price set by the OPEC cartel, nonetheless have pressed the view that pricing is properly a provincial prerogative by virtue of their jurisdiction over provincial public property, over "property and civil rights in the province" and, in general, over matters of a local nature. More recently Alberta has conceded federal pricing authority.[23]

The producing provinces have continued to assert their power as proprietors of production from Crown reserves. Alberta, for example, has maintained a system under which Crown oil and gas must be marketed through the Alberta Petroleum Marketing Commission. It can be argued that this includes the province's exclusive power to set prices and to sell at those prices. But from the outset the debate has been a token one since all levels of government have agreed on the need for ultimate development of a negotiated domestic price structure.

On essentially the same constitutional premise, the producing provinces have consistently argued their entitlement to the bulk of resource rents either by virtue of their status as proprietors or as a result of their jurisdiction to levy taxes against freehold operators. In this regard the federal imposition of the Petroleum Export Tax was originally viewed by the producers as an "expropriation of provincial property." On the basis of the Ottawa-Alberta oil-pricing agreement, the federal government has reduced the rate on this tax to zero.

Alberta has resisted Ottawa's attempts to establish priorities for new energy-resource developments. The recent provincial regulatory strictures on new tar-sands development are a good illustration. Despite express federal policy favouring more tar-sands plants, the Alberta Cabinet has refused to allow the necessary regulatory approvals to be issued. One can only assume that this refusal, in part, reflects concern that provincial revenue ambitions for conventional petroleum and natural gas production might otherwise be thwarted. That is to say, the stronger the threat of future shortages, the greater the pressure (and therefore Alberta's leverage) to control current pricing, and, ultimately, the larger the potential profit available to Alberta from present conventional production and future sources of supply of all types, including synthetics. In this regard the connection between the jurisdiction to regulate production and the capacity to control the value of a limited resource is an obvious and central fact of life that is recognized by all participants in the debate, most especially by the producing provinces.

Moreover Alberta and British Columbia have taken the position that a strong provincial role is appropriate in relation to decisions concerning the balance of service between the American export market and the quantities of gas and petroleum held in reserve to supply future Canadian market needs. The NEB approval of natural gas exports, given in 1979, represented the culmination of a great deal of debate on this subject. In this instance the possibility of new gas exports was first raised during the discussions between the then Vice-President Mondale and the Premier of Alberta. The initial round of talks reportedly indicated that Alberta would consider increasing gas flows in exchange for American tariff concessions in the market areas of agricultural and petrochemical products. It would be an understatement to suggest that the jurisdiction of the federal government made the substance of these negotiations presumptuous.

Indeed, at the time, the NEB's most recent published report had declared that there was no gas available for export, and there was general debate that included a number of federal departments about the dangers inherent in the development of a potentially redundant petrochemical industrial base in the Province of Alberta. It is noteworthy, however, that the NEB's export criteria were ultimately adjusted, that an export was facilitated that conformed roughly to the terms considered in the Mondale-Lougheed talks, and that the pace of petrochemical development in Alberta has continued despite the likely effect on future feedstocks for Ontario's counterpart industry.

As a practical issue the provincial view has largely prevailed with respect to petroleum and gas policies since 1973, despite the federal assumption of the power to determine domestic prices unilaterally, if necessary, and notwithstanding the federal Petroleum Export Tax and the Import Compensation Program. The domestic producing provinces, like the international producers of oil, exercise a whip hand by virtue of their threat to regulate production destined for interprovincial markets; this threat has had a major effect on all phases of energy-related arrangements between the federal and provincial governments.

In Alberta particularly, the jurisdictional conflict has been enlarged by a degree of legislative detail. At issue here are the provisions of the Petroleum Marketing Act[24] and the revisions to the Mines and Minerals Act.[25] Under the former provisions the province has assumed the power to set prices "in the public interest of Alberta" through the Alberta Petroleum Marketing Commission (APMC)[26] and in the interim to order the storage of Crown petroleum. The APMC is also empowered, where necessary, to direct pipeline and storage owners to operate their facilities according to its wishes. The Mines and Minerals Act revisions have authorized the provincial Cabinet to curtail production of Crown oil. Taken together, it is clear that Alberta does, in fact, intend to give substance to the theory that its jurisdiction over petroleum and gas will prevail both politically and judicially.

Canada's energy position in 1982 is fundamentally different from its position a decade ago. The new National Energy Program reflects these changes, although the precise shape of our present policy is at this time somewhat undefined.

The most pressing priorities for Canadian energy planners will be determined to a significant degree by events outside the country. Despite the recent contention that we should aim at achieving oil self-sufficiency by 1990, there is virtually no authority that seriously anticipates a reversal of current production declines. At most Canada can attempt a rear-guard action to counter imminent declines in petroleum supplies from both domestic and foreign sources by means of massive conservation and energy substitution, making particular use of natural gas and electrical power.

It will become increasingly important to deal with the fact that the so-called 'energy problem' is not strictly, or even largely, a matter of the quantity of oil available at any given moment. The connection between the cost of supplies and their ultimate value to the economy at large is inescapable. It is of little use to be blessed with massive quantities of petroleum or natural gas that will cost more than people can afford to pay. Indeed the cost of remaining low-cost reserves may yet have to be regulated to offset the cost of premium supplies that might become technically available in the future, but will otherwise remain too expensive to develop. Price blending between low- and high-cost sources of supply may well become in the future a more substantial preoccupation of energy regulation than moving toward a so-called 'world-commodity oil price' with the alleged object of encouraging consumer conservation and of increasing private investment in areas of frontier or synthetic potential. Central policies that depend on steady price hikes may yet result in conservation at the expense of the well-being of the economy and the people. While no one doubts that less energy is used in a recession or depression than in an economically healthy climate, the cure under the former circumstances is clearly worse than the disease itself.

In short Canada will undoubtedly be forced in the future into ever more detailed management of and participation in the energy sector. Concern over costs will increase the pressure for more intimate controls over marketing at an interprovincial level. Even greater worries over supply security and the need to achieve fuel substitution that will reduce oil dependence will also urge a heightened federal presence in the marketing field. The extremely large capital demands of this sector may also produce a greater need to establish the priority of future projects carefully; and here again the federal government may prove to be uniquely qualified to assume the task. Finally, there is the possibility of distress conditions overtaking the constitutional niceties and forcing the most extensive kind of federal regulation. Canada's energy problems are rooted in circumstances that are distinct from those of most other modern Western industrial economies. First, Canada is both a significant producer and a significant consumer of oil and gas. Secondly much of our consumption is directly attributable to harsh climatic conditions and the relatively long distances with which the economy must contend. Canadians, in short, depend as much on the energy demand-and-supply balance for our very survival as we do for our ability to generate wealth and employment.

To say the least, it is at this stage evident that the existing formal constitutional arrangement will necessarily alter in future, if not only to reflect new federal and provincial regulatory ambitions, then at least to reflect the present *de facto* division of regulatory competence between the federal and provincial governments. It is to this topic that we shall now turn.

Constitutional Options

Classical Federalism: Rearrangement of Powers

The oil- and gas-producing provinces have pushed hard in the recent rounds of federal-provincial constitutional discussions for changes in the existing division of powers to strengthen provincial ownership and control of natural resources. Support for this general objective of confirming provincial control over resource development and ensuring that federal policies are and remain compatible with provincial resource strategies is not confined to the producer provinces. At the Premiers' Conference in Regina in August 1978, all ten provinces expressed support for "the confirmation and strengthening of provincial powers with respect to resources."[27] This unanimity on the need for clear constitutional recognition of jurisdiction over development and management of resources, based on provincial ownership, was confirmed by the provincial Premiers at the Federal-Provincial Conference of First Ministers on the Constitution in September 1980.

It is clear, however, that any significant redistribution of powers over resources requires, not only clarification of the existing powers over provincial resource ownership and management, but also modification of certain of the exclusive federal heads of legislative authority.[28] From a provincial standpoint change means abolishing or substantially reducing the scope of these federal powers. To extend the existing provincial power to levy direct taxes so that it would include the power to impose indirect taxes would, in practice, cut into existing federal taxing powers because of the limited taxation-revenue 'pie'.

It is when discussion moves from strengthening provincial powers over natural resources to limiting concomitant federal powers that unanimity among provinces evaporates. Negotiations between federal and provincial First Ministers show clearly that the critical resources issues concern limitation of federal powers, primarily in the areas of trade and commerce and taxation.

Until quite recently it appeared that the federal government might be prepared to make enough concessions to satisfy even the major oil- and gas-producing provinces. For example Bill C-60, the proposed Constitutional Amendment Act of 1978, contained a provision that would have required the federal government to consult with provinces prior to any invocation of the declaratory power.[29] This proposal, however, constituted a federal retreat from earlier Prime Ministerial statements that the declaratory power could be abolished. It also fell short of proposals by some provinces that the power be used only with the concurrence of the province or provinces concerned.[30]

The First Ministers' Conference on the Constitution held in October 1978 established a Continuing Committee of Ministers on the Constitution (CCMC) that was charged with responsibility for achieving consensus on various constitutional issues. A report, including draft proposals, entitled "Resource Ownership and Interprovincial Trade," was submitted to the First Ministers in February 1979. The draft, which became known as the '"Best Efforts" Draft',[31] addressed the three fundamental issues: resource ownership and management, trade and commerce, and taxation. Included were proposals that would empower provinces to take the following action:

- Exclusively to make laws in relation to exploration, development, conservation, and management of non-renewable natural resources.
- To legislate concerning the export of natural resources from the province, provided that such laws are not discriminatory in terms of prices or supplies. These provincial export laws would prevail over federal trade-and-commerce laws in the event of conflict, except in the case of federal laws concerning international trade and commerce and federal laws for

regulation of trade and commerce within Canada and necessary to serve a "compelling national interest."

- To enact laws to impose direct or indirect taxes on resources, including primary energy-resource products such as upgraded heavy crude oil. However, such taxes could not differentiate between resources exported from the province and those not exported.

These changes would considerably strengthen provincial powers to manage oil and gas resources. Such amendments to the BNA Act would reverse the two leading constitutional cases on resources, both of which were decided in favour of the federal government by the Supreme Court of Canada. Results favourable to the Province of Saskatchewan would have been produced on the taxation issues in both the *CIGOL*[32] and *Central Canada Potash*[33] cases. Similarly the province would have prevailed in the trade-and-commerce issues in the absence of federal laws that could be shown to be necessary in order to serve a compelling national interest.[34] No such directly conflicting federal laws were in place.

The "Best Efforts" Draft proposals received general acceptance in 1979.[35] By the summer of 1980, however, the federal position had changed. Ottawa now asserted that powers over the economy must be firmly linked to natural resources issues. The federal government also rejected the draft provisions that would have given the provinces primary authority over the export of resource production. In particular a direct federal paramountcy provision was substituted for the "Best Efforts" Draft provision for provincial paramountcy, subject to the exceptions based on "international trade" and "compelling national interest."[36] When these revised proposals were placed before the Constitutional Conference of September 1980 by the Prime Minister,[37] they were described by Premier Lougheed of Alberta as "nominal and insignificant" and rejected by nine of ten provinces.[38]

Initially the Constitutional Bill, 1981, the federal government's constitutional package, contained no provisions concerning natural resources. Most of the provinces protested this omission. But the present federal intention is, in any event, that the proposed constitutional reforms be implemented without provincial concurrence.

Subsequently, following an exchange of letters between Prime Minister Trudeau and Mr. Broadbent, the leader of the New

Democratic Party, an amendment relating to resources was added.[39] With one significant exception, this amendment is broadly similar to the "Best Efforts" Draft proposal. The provincial authority to make laws relating to the export to other parts of Canada of primary non-renewable resource products is qualified by a clear and concise federal paramountcy provision.

The course of federal-provincial 'negotiations' and particularly the fate of the "Best Efforts" Draft shows that there are a number of fundamental problems involved in proposals to modify the existing division of powers as a means of settling issues related to energy-resource management and development. First, certain key limits of jurisdiction over existing resources are uncertain. Secondly existing legislation and resource-management practices in producer provinces may be difficult to change as a matter of practice. Thirdly the federal government has recently taken a tough position on proposed broadening of provincial powers over natural resources. Finally, extended provincial resource powers are likely to create a *de facto* special status for producer provinces.

The uncertain status of resources

Federal power to set conditions for the export of natural resources is relatively clear,[40] but there is little agreement on several key issues concerning the current law governing division of powers over resources. First, the scope of the emergency aspect of the peace, order, and good government power as a basis for direct federal management and sale of provincial oil and gas is far from clear. From the Supreme Court's holding that control of inflation is an appropriate subject for emergency authority, we can infer that national energy supply and allocation may also be designated appropriate subjects for federal emergency regulation.[41] We know that while a federal declaration of national emergency is not conclusive, any party challenging this judgement bears a relatively heavy responsibility.[42] But it is not clear whether or not, for example, NEB forecasts of short-term regional fuel-oil shortages would form a sufficient basis for federal assumption of complete management of oil and gas and their production control. Implementation of temporary mandatory allocation or rationing, such as that under the Energy Supplies Emergency Act,[43] would be more consistent with the nature of this kind of 'emergency' and therefore, arguably, more clearly referable to the emergency power.[44]

Nor is it clear that the peace, order, and good government power operates in the same way in relation to provincial resources and public property as it does in relation to heads of otherwise exclusively provincial legislative power enumerated in section 92 of the BNA Act. The source of the peace, order, and good government power lies in the opening words and concluding clause of section 91. This suggets that this ultimate federal power was intended by the BNA Act's draftsmen to operate only against section-92 powers and not against distributive provisions relating to public property that appear elsewhere in the Act. Thus it is arguable that section 109 and related provisions in Part VIII operate to 'entrench' provincial ownership of public property.

Such care to guarantee provincial ownership is consistent with the understanding at Confederation that provincial property would be the foundation of provincial government operation. From this premise it follows that provinces are limited to levying direct taxes. Similarly care was taken, when new provinces entered Confederation after 1867, to guarantee them this natural resource base. This revenue base was granted somewhat grudgingly to the Prairie provinces after years of delay. But once granted by the Resources Transfer Agreements, provincial resource ownership was clearly confirmed by the 1930 BNA Act Amendments.

It can be argued that the "Best Efforts" Draft would clarify the extent of provincial ownership powers, particularly in relation to export laws for provincial resources. But the original "Best Efforts" Draft, the federal revision, and section 57 of the Constitution Bill, 1981 all beg the question of the relationship between provincial powers based on ownership and the federal peace, order, and good government power. Provincial ownership powers are strengthened by the specific reference in section 57 to provincial regulation of the rate of primary production.[45] However, the resources amendments do not completely clarify the extent to which provincial ownership laws could impose conditions that indirectly affect export of oil and gas resources.[46]

The original draft with its "compelling national interest" exception[47] would have codified an interpretive formula for resource-export issues that is closely analogous to some judicial formulations of the broader peace, order, and good government power.[48] Many of the analytical problems discussed above that currently plague the emergency formulation of the general power[49] would become associated with issues relating to the export of oil and gas.

Both the revised "Best Efforts" Draft and section 57 of the Constitution Bill, 1981 bring in the uncertain jurisprudence on the paramountcy doctrine. Development of a conceptual test to determine when paramountcy comes into play has been the most vexing problem. The current "operating incompatibility"[50] criterion is highly sensitive to circumstances so that particular decisions provide little prospective guidance.

Similarly it is not clear whether a declaration of works as "Works . . . for the general Advantage of Canada," in section 92(10)(c), can operate as an expropriation of the oil and gas in the ground that the declared works are designed to produce. Clause (c) refers only to "Works," not "Works and Undertakings." The other clauses of section 92(10) suggest intended limitation to physical works such as transportation facilities. The context suggests regulatory authority rather than direct resource ownership.

It is also far from certain whether, in given circumstances, provincial levies or charges must be designated as indirect taxes (and therefore outside provincial direct taxation powers)[51] or as infringing the trade-and-commerce power. The extent of this uncertainty can be appreciated by comparing the majority judgment of Martland J. and the dissenting judgment of Dickson J. in the *CIGOL* case.[52]

It is not clear, either, how federal taxation powers fit with provincial ownership jurisdiction. An argument can be made that interjurisdictional principles of tax immunity may limit federal powers to tax provincial oil and gas, even by way of export tax, if those reserves are directly developed and sold by the Crown in right of a province.[53] The Alberta government contracted in the summer of 1980 for the drilling of three gas wells near the Montana border. It made arrangements to produce the wells and sell the gas directly to purchasers in Montana, thus setting up the factual basis for a judicial reference to test the limits of federal jurisdiction to regulate and to tax exports of provincially owned natural gas.

In an unanimous decision issued 20 March 1981, the Alberta Court of Appeal held that the Federal Natural Gas and Gas Liquids Tax does not apply to the provincial natural gas described in the Reference.[54] The tax, which is a major component of the National Energy Program, is not directed primarily to export gas. Nor do the Reference facts reflect the current organization of Alberta's natural gas industry since by far the most gas is produced under Crown leases by private producers who would not be immune from the tax. However, the case does establish a limit to federal taxing powers. It also tends to confirm the idea of entrenched status for provincial public property and resources.

Existing provincial resource legislation

A second problem arises from the fact that oil- and gas-producing provinces have a full and detailed legislative framework for management and regulation of these resources. This legislative framework carries the weight of history and reflects developments in government and in the industry over the period of exploration and production in each particular province. It also reflects understandings and accommodations reached by government and industry from time to time. Moreover oil and gas interests are conveyed by documents that are contractual in nature, particularly at the development and production stages. This lends a relative certainty, or at least predictability, to the 'rules of the game' under which oil and gas resources are developed and produced.

For political and administrative reasons, this enabling legislation may be difficult to change so that it reflects variations in the constitutional division of powers to legislate concerning resources. The oil industry has placed considerable emphasis on this need for good relations with government and relative certainty in the 'rules of the game'.

There may also be legal constraints on abrupt provincial changes in resource tenures. It has been argued, for example, that the standard Crown oil and gas lease currently used in Alberta may be legally immune to unilateral revision by government through legislative means.[55] The argument holds that in entering into a lease, the parties adopted the contract mode to govern their relations, notwithstanding the "compliance with laws" clause that purports to authorize the province to make unilateral changes. There are certain basic or core terms of this contract, such as the grant of an interest in land, that are so fundamental to the relationship that they cannot be unilaterally changed by the government acting under the "compliance with laws" clause. It has also been pointed out that the "compliance with laws" clause is part of the covenants and conditions of the lease, and not part of the basic conveying provisions. The result is that while the government can attempt to change leases in its legislative capacity, it may be prevented from asserting that the constitutional basis for such legislation is founded on provincial resource ownership. This legislation may be considered as regulating resources, most of which are exported from the province and consequently *ultra vires* for the regulation of trade and commerce.

It is also possible that the granting clause of Crown oil and gas leases conveys a full interest in the minerals in place so that, following the leasing of oil and gas resources, the Crown's ability to regulate by laws based on provincial resource ownership is at an end.[56] Precisely what is granted depends on the words of the granting clause in each particular lease. But analysis of Alberta Crown leases suggests that the better view is that at most profits *à prendre*[57] are granted, with significant reversionary property interests remaining in the Crown.[58] Even this form of grant suggests that jurisdiction stemming from Crown ownership ends at the well-head when the substances are produced and converted to chattels.

The federal interest in oil and gas resources

Another major problem becomes apparent from the discussion of the fate of the "Best Efforts" Draft. The federal government's inclination to accept the idea of limitation of federal powers over provincial resources has decreased markedly over the past two years. In fact, since the 1980 winter election, federal resolve to increase its *de facto* regulatory position in relation to energy resources has strengthened considerably.

First there was the retreat from the "Best Efforts" Draft brought about by adopting the position that federal paramountcy over energy-resource export was necessary. Next there was the extremely hard-nosed bargaining posture adopted when it became necessary to negotiate with Alberta concerning renewal or extension of the 1974–75 oil- and natural gas-pricing agreements. Alberta took the position that it would accept nothing less than a pricing package equivalent in "value" to that offered by the Conservative government prior to its abrupt departure from office. As negotiations progressed, details were not disclosed, but it became apparent, when the failure of the talks was announced in late July 1980, that the two sides had never been close. Finally, the natural resources amendment that was included in the Constitution Bill, 1981 retained the federal paramountcy provision.

Basically the problem is revenue sharing. There is general agreement that oil prices must rise. But pressing federal revenue requirements resulting from decreasing tax revenues in a shrinking economy, coupled with a mounting deficit, have caused the federal government to press for an increased share of oil revenues. This federal revenue problem is compounded by the petroleum-import-compensation scheme designed to cushion Eastern Canadians against the substantially higher price of imported crude oil. This program cost the federal government more than $3 billion in 1981. In addition, because the equalization-payment system is based on average provincial revenues, increased oil and gas royalties flowing to producer provinces, particularly Alberta, result in increased payments from the federal treasury to 'have-not' provinces. Alberta figures for 1980 suggest that the federal government received only 14 per cent of every oil and gas dollar, with 52 per cent going to the industry and 34 per cent to the Alberta government.[59] A principle objective of the federal National Energy Program, 1980 was to increase the federal share of oil and gas revenues during the 1980–83 period[60] to approximately 24 per cent.

It has properly been pointed out that while revenue sharing is an important current issue, it is not the ultimate issue.[61] The ultimate issue is economic and political power. A growing federal recognition of the power associated with control of the nation's oil and gas resources is undoubtedly behind the stiffening of federal positions on constitutional revisions that would have the effect of shifting greater authority over natural resources to provincial governments.

Special position for producer provinces

A final problem is that while proposals to strengthen provincial powers over natural resources are general in the sense that they would apply to all provinces, their practical effect is to create a special position for the producing provinces. In fact even the current position accords a kind of special position to producer provinces simply because of the fortuitous location of oil and gas deposits within their boundaries. The vagaries of resource location lend a further ambiguity to the issue in that it is difficult to predict whether future discoveries are likely to distort relative degrees of provincial wealth in yet a different way.

Special Status

It has been pointed out that energy-producing provinces currently enjoy a special position, and that efforts are under way to enhance this position through some form of redistribution of powers. However, this does not constitute special status[62] since it does not and would not involve conferring on one or more provinces constitutional powers different from those accorded other provincial governments. Notwithstanding the prominence of "Western alienation" concerns in recent media reports, no element of special constitutional status in relation to natural resources has been proposed by producer provinces. Considerable care was taken in the "Best Efforts" Draft and in section 57 of the Constitutional Bill, 1981 to include non-discrimination limitations on extended export and taxation powers over provincial resources in order to avoid possible development of *de facto* special status in resource matters. The essential concern is the increased political and economic power that would flow from special status based on natural resources.

Discussion of special status is extremely difficult in the context of natural resources. Not only does confusion arise between *de facto* and *de jure* 'special status' when one is discussing the position of producer provinces, but there is room for argument about which provinces enjoy *de facto* special status. Alberta, for example, has contended that consuming provinces such as Ontario have enjoyed a special position under an oil-pricing agreement[63] that kept prices substantially below world-price levels. This position was maintained by the two-dollar-per-barrel price increase announced by Alberta on 1 August 1980 and by the pricing schedule proposed in the National Energy Program. Any new agreement that does not move prices toward world levels at a relatively rapid rate will maintain this special position that, one can argue, gives consuming provinces a "share" of Western energy resources and resource revenues.

It is difficult to imagine that any special status arrangement designed, for example, to address Quebec's language and cultural concerns would have a significant impact on oil and gas resources. In fact it is difficult to imagine any special status that includes powers primarily concerned with economic or public property matters. Discussion of these issues inevitably leads to consideration of some form of sovereignty for the province or region concerned.

Sovereignty

Sovereignty for a Canadian province or region, as it affects oil and gas, invites comparison with current relations regarding oil and gas between Canada and the United States. For example, sovereign status for Quebec would require combinations of international agreements, domestic regulatory systems, and domestic enabling legislation to deal with such matters as follow:

- Pipeline transit
- Export regulations governing the quantity and price of oil and gas
- Taxation and tariffs
- Strategic concerns
- Foreign ownership and control of oil and gas industries
- State oil and gas enterprise
- Marine tanker transit and oil-pollution risks.

New international agreements on such matters as taxation, defence, and pipeline transit would be necessary. Much Canadian regulatory legislation that deals with aspects of all of the matters listed is already in place. However, implementation through regulations, orders, or decisions on particular applications would be required. Legislative amendments would also be enacted to deal with special issues concerning international relations with Quebec. Certain existing international institutions, such as the International Joint Commission, might be modified, with American concurrence, to function as trilateral mechanisms.

The starting point for negotiations with Quebec would undoubtedly be Canada's existing arrangements with the United States. It seems unlikely that positions could be conciliatory in circumstances following separation. On export issues export-price guidelines of the National Energy Board Act[64] that make such conditions as 'surplus to Canadian needs' and 'just and reasonable in the Canadian public interest' would serve as references. Advantage in export negotiations would appear to lie with Canada since Canadian oil and gas imports are likely to be viewed as more secure than offshore sources, particularly given existing transportation systems. The possibility for significant exports of natural gas to Quebec seems good, given the current surplus situation in Western Canada. However, although Alberta's proposals that natural gas prices be reduced during the early years of gas supply to Quebec in order to encourage energy substitution have been viewed favourably by the NEB,[65] they are not likely to be approved for export to a sovereign Quebec. Canadian subsidization of foreign exports for purposes of market development in the early years of Canadian export to the United States are still a sufficient embarrassment to discourage proposals for incentive prices to Quebec.

There would be difficult negotiations concerning offshore resources that would establish a territorial division for offshore exploration on the East coast. The long-simmering disputes between Quebec and Newfoundland concerning Labrador's boundary and transmission of electricity would be thrown into a new focus. The issues would then have to be resolved in international negotiations against international systems and principles of resolving disputes.[66] The issue could be important in terms of oil and gas, given the presence of promising geological structures in the Labrador-shelf area.

Ideas would undoubtedly surface concerning some type of energy arrangement governing the North American continent. However, the current Canadian mood is against such arrangements with the United States, and it is difficult to see why Canada would adopt a more conciliatory attitude in tripartite continental energy discussions that included Quebec. An essential weakness in Quebec's position would be its lack of status as a significant producer of oil and gas. In fact Quebec could not even expect as favourable a position with Canada, in relation to oil and gas, as the United States now enjoys since Quebec would have far less to offer and would possess far less economic and strategic 'clout' than the United States does now.

Traditionally foreign investment in general and American investment in particular have been welcomed by Canada's Western producer provinces. A similar attitude can already be detected in east coast provinces as they move toward the status of oil and gas producers. It may be expected, therefore, that in a new Canada, following Quebec's separation, Western and Atlantic provinces would favour removal or weakening of foreign ownership controls that the current federal government is in the process of extending and sharpening.[67] In the new power balance resulting from a new population distribution and from Western political and economic power flowing from resource revenues, such proposals may be forced on a reluctant Ontario. The ultimate result could be a form of economic union with the United States, with Quebec remaining on the outside in a less favourable position.

Sovereignty-Association

Sovereignty-association differs conceptually from sovereignty merely in that certain bilateral agreements and institutional arrangements would be developed from negotiation between Canada and a sovereign Quebec. To the extent that these arrangements included free trade and a common tariff, relations pertaining to oil and gas would differ little from their situation in the present régime. The difference would be institutional since it must be assumed that decisions on such matters as interstate pipelines and the import and export of oil and gas could no longer be made by the NEB. Some kind of international regulatory agency would be required, though it is likely that this new body would be closely linked to the domestic regulatory agencies of Canada and Quebec and possibly to that of the United States. It is possible that the venerable International Joint Commission could serve as a model for such an international agency.

In sovereignty-association negotiations Quebec would be hampered by its relative lack of major energy-resource production. Its hydro-electric resources would be significant, but these would be outweighed by the power flowing from Canada's status as a producer and exporter of oil and gas.

Conclusions

Perhaps the central conclusion to be drawn from this discussion is that oil and gas have emerged as energy resources that, in their political and economic significance, transcend national constitutions and even arrangements between nations. As OPEC and the events of 1973 have shown, Canada operates an 'oil economy'. Control of these resources, either through ownership or through regulatory jurisdiction, is a primary source of political power. This is true among provinces within a nation just as it is among nations. The Canada-Alberta oil-pricing negotiations provide a graphic illustration of this fact within Canada.

This suggests that it may be impossible in a constitutional document to deal with oil and gas through the division of law-making powers between central government and producer provinces. The provinces have almost become surrogates for economic power and the political power associated with it.

The main problem is that the central issues are fiscal, not jurisdictional. Fiscal matters cannot be easily handled in constitutional documents because constitutions are expressed in terms of legal rights and powers in relation to defined subject matters, and not in terms of numbers or dollars. It would be possible to prescribe relationships in a new constitution in terms of precise figures for sharing oil and gas revenues. However, such a prescription would not be wise, given the complex and changing nature of the oil and gas industry and the changing relative economic positions of Canada's federal government and her various provinces. Such a revenue-sharing formula, once inserted in the Constitution, could be changed only by formal constitutional amendment.

Similarly the economic and political importance of oil and gas resources makes it unlikely that any special status arrangement will involve powers that relate to these resources. Under Quebec's sovereignty, or even under some form of sovereignty-association, the critical importance of energy resources makes it likely that Canada would adopt a stiff posture on oil and gas matters that would leave a sovereign Quebec relatively little better off than the United States in terms of access to Canadian supplies.

Appendix A

Draft Proposal Discussed by First Ministers at the Federal-Provincial Conference on the Constitution, Ottawa, February 5-6, 1979

Resource Ownership and Interprovincial Trade

(1) (present Section 92)	(1) Carries forward existing Section 92.
Resources (2) In each province, the legislature may exclusively make laws in relation to a) exploration for non-renewable natural resources in the province; b) development, exploitation, extraction, conservation and management of non-renewable natural resources in the province, including laws in relation	(2) The draft outlines exclusive provincial legislative jurisdiction over certain natural resources and electric energy within the province. These resources have been defined as non-renewable (e.g. crude oil, copper, iron and nickel), forests and electric energy. This section pertains to *legislative* jurisdiction and in no way impairs established *proprietary*

to the rate of primary production therefrom; and

c) development, exploitation, conservation and management in the province and of sites and facilities in the province for the generation of electrical energy, including laws in relation to the rate of primary production therefrom.

rights of provinces over resources whether these resources are renewable or non-renewable.

Export from the province of resource

(3) In each province, the legislature may make laws in relation to the export from the province of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for prices for production sold for export to another part of Canada that are different from prices authorized or provided for production not sold for export from the province.

(3) Provincial governments are given concurrent legislative authority to pass laws governing the export of the resources referred to above from the province. This legislative capacity is in the sphere of both interprovincial and international trade and commerce. Provincial governments are prohibited from price discrimination between resources consumed in the province and those destined for consumption in other provinces. This new provincial legislative capacity applies to these resources in their raw state and to them in their processed state but does not apply to materials manufactured from them.

Relationship to certain laws of Parliament

(4) Any law enacted by the legislature of a province pursuant to the authority conferred by subsection (3) prevails over a law enacted by Parliament in relation to the regulation of trade and commerce except to the extent that the law so enacted by Parliament,

a) in the case of a law in relation to the regulation of trade and commerce

(4) The effect of this provincial legislative responsibility over trade and commerce diminishes the scope but does not eliminate the federal government's exclusive authority over trade and commerce. The exercise of the provincial power is subject to two limitations. First, the federal government may legislate for interprovincial trade if there is

within Canada, is necessary to serve a compelling national interest that is not merely an aggregate of local interests; or

b) is a law in relation to the regulation of international trade and commerce.

"compelling national interest". This trigger mechanism may apply to circumstances other than an emergency as established under the peace, order and good government power. Second, federal laws governing international trade prevail over provincial laws in international trade, in effect establishing a concurrent power similar to that for agriculture.

Taxation of resources

(5) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of
   a) non-renewable natural resources and forestry resources in the province and the primary production therefrom; and
   b) sites and facilities in the province for the generation of electrical energy and the primary production therefrom,

whether or not such production is exported in whole or in part from the province but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

(5) Provincial powers of taxation are increased to include indirect taxes over the resources outlined in this section — whether these resources are destined in part for export outside the province. These taxes are to apply with equal force both in the province and across the rest of the country.

Production from resources

(6) For purposes of this section,
   a) production from a non-renewable resource is primary production therefrom if

(6) In determining the scope of provincial legislative powers over resources exported from the province, it became necessary to define the degree to

i) it is in the form in which it exists upon its recovery or severance from its natural state, or

ii) it is a product resulting from processing or refining the resource, and it is not a manufactured product or a product resulting from refining crude oil or refining a synthetic equivalent of crude oil; and

b) production from a forestry resource is primary production therefrom if it consists of sawlogs, poles, lumber, wood chips, sawdust or any other primary wood product, or wood pulp, and is not a product manufactured from wood.

which the resource was processed. It is not intended to extend provincial authority to manufacturing but it is intended to extend it to something beyond its extraction from its natural state. Given the varying resources covered by this section, the wording of this sub-section is thought to place the appropriate limitations on provincial powers.

Existing Powers

(7) Nothing in subsections (2) to (6) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of those subsections.

(7) This clause ensures that any existing provincial legislative powers found in s. 92 are not impaired by the new section.

Appendix B

"Revised" Federal proposal, from the Statement by the Prime Minister on Resource Ownership and Interprovincial Trade to the Federal-Provincial Conference of First Ministers on the Constitution, 8-12 September 1980.

The Government of Canada, for its part, responds as follows:

- On *ownership and management*, we have no problem in accepting the principle and are in substantial agreement with the text which has been worked out.
- On *exports of resources*, we agree that provinces should have concurrent power over exports to other parts of Canada, subject to federal paramountcy over interprovincial trade. We do not agree that this concurrent power should extend to provincial exports to other countries.

- On *direct taxation*, we are ready to accept the text which is supported by eight provinces.
- On *primary production*, we are also ready to accept the text which is supported by the great majority of the provinces.

The Government of Canada, in making proposals for changes in this important field, has to bear in mind the enormous importance which resources already play in the economy and the lives of Canadians. As resources become more scarce in the world, they will play an even greater part. We must think more than twice before making changes which could substantially reduce the future capacity of the federal government to carry out its responsibility for Canada as a whole. In the circumstances, I believe that the response I have just indicated, which is positive on a number of important points, warrants serious consideration.

Appendix C

PART VII

AMENDMENT TO THE CONSTITUTION ACT, 1867

Amendment to *Constitution Act, 1867*

57. The *Constitution Act, 1867* (formerly named the *British North America Act, 1867*) is amended by adding thereto, immediately after section 92 thereof, the following heading and section:

"Non-Renewable Natural Resources, Forestry Resources and Electrical Energy

Laws respecting non-renewable natural resources, forestry resources and electrical energy

92A. (1) In each province, the legislature may exclusively make laws in relation to

(*a*) exploration for non-renewable natural resources in the province;

(*b*) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(*c*) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

Export from provinces of resources

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical

energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

Authority of Parliament

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

Taxation of resources

(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

(*a*) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and

(*b*) sites and facilities in the province for the generation of electrical energy and the production therefrom,

whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

"Primary production"

(5) The expression "primary production" has the meaning assigned by the Sixth Schedule.

Existing powers or rights

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section."

Idem

58. The said Act is further amended by adding thereto the following Schedule:

"THE SIXTH SCHEDULE

Primary Production from Non-Renewable Natural Resources and Forestry Resources

1. For the purposes of section 92A of this Act,

(*a*) production from a non-renewable natural resource is primary production therefrom if

(i) it is in the form in which it exists upon its recovery or severance from its natural state, or

> (ii) it is a product resulting from processing or refining the resource, and is not a manufactured product or a product resulting from refining crude oil, refining upgraded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil; and
>
> (*b*) production from a forestry resource is primary production therefrom if it consists of sawlogs, poles, lumber, wood chips, sawdust or any other primary wood product, or wood pulp, and is not a product manufactured from wood."

Notes

1. Section 109 British North America Act, 1867: "All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any interest other than that of the Province in the same." See also British North America Act, 1930, 20–21 Geo V, c. 26 (U.K.) which implemented the Resources Transfer Agreements and thereby placed Alberta, Saskatchewan, and B.C. (as to the Railway Belt and Peace River Block Lands) on the same footing as the other provinces under section 109.

2. British North America Act, 1867, s. 95(5): "The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon."

3. *Ibid.*, s. 92(13): "Property and Civil Rights in the Province."

4. *Ibid.*, s. 92(16): "Generally all Matters of a merely local or private Nature in the Province."

5. The question of whether and the extent to which property in the resources is granted or disposed of depends on the terms of each particular lease document. Analysis of eighteen Alberta Crown leases used between 1949 and 1981 suggests that there have been no outright grants of oil and gas in the ground. At most, profits *à prendre* (that is, rights to recover and sell the oil and gas) are granted, with a reversionary property right remaining in the Crown. See A. Gervais, "The Nature of the Interest Granted Under Alberta Crown Petroleum and Natural Gas Leases," (unpublished paper on file at University of Calgary Law Faculty, April 1981). Whether or not the provinces can assert constitutional powers based on resource ownership depends in part on whether the Crown provincial has retained a property interest in leased resources.

6. See text below, pp. 32–44.

7. British North America Act, 1867, s. 9(12): "The Regulation of Trade and Commerce." See *C.I.G.O.L. v. Attorney-General of Saskatchewan*, (1978) 18 N.R. 107 (S.C.C.); (1977) 6 W.W.R. 607 (S.C.C.)

8. British North America Act, 1867, s. 91(3): "The raising of Money by any Mode or System of Taxation." See *C.I.G.O.L. v. Attorney-General of Saskatchewan*, note 7, above.

9. British North America Act, 1867, s. 92(10): "Local Works and Undertakings other than such as are of the following Classes: (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province."

10. *Ibid.*, s. 10(c): "Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces."

11. *Ibid.*, s. 91 (preamble): Two main "Peace, Order and good Government" theories have been developed by the Courts: (1) "National Emergency." See *Reference Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373, (1976) 68 D.L.R. (3d) 453 (S.C.C.) and (2) "National dimensions." See *Attorney-General of Ontario* v. *Canada Temperance Federation*, 1946 A.C. 193, (1946) 2 D.L.R. 1 (P.C.) and Dale Gibson, "Measuring 'National Dimensions'," *Manitoba Law Journal* 7 (1976): 15–27.

12. See generally John Davis, *Canadian Energy Prospects*, Special Study No. 13 prepared for the Royal Commission on Canada's Economic Prospects (Ottawa: Queen's Printer, 1957).

13. See generally Earle Gray, *The Great Canadian Oil Patch* (Toronto: Maclean-Hunter, 1970).

14. See Exportation of Power and Fluids and Importation of Gas Act, S.C. 1955, c. 14.

15. See W. Rostow, "The Challenges of Economic Growth."

16. See the Pipelines Act, R.S.C. 1952, c. 211.

17. See the National Energy Board Act, S.C. 1959, c. 46.

18. See Canada, Royal Commission on Energy, *First Report* (Ottawa: Queen's Printer, 1959).

19. *Ibid.* The concern particularly related to the contractual arrangements between Westcoast Transmission and El Paso Natural Gas in the United States. Additional attention was focused on Canadian Montana and its sales to its parent, Montana Power.

20. That is to say, the embargo and price hikes.

21. See generally Energy Resources Conservation Board, "Review of Field Pricing of Gas in Alberta," E.R.C.B. Report 73–1–OG, (Calgary, July 1973).

22. See National Energy Board, Engineering Branch, *Preliminary Report — Potential Limitations of Canadian Petroleum Supplies, Oil and Gas* (Ottawa, December 1972).

23. Nationally televised address by Premier Peter Lougheed in response to announcement of the National Energy Program, 30 October 1980.

24. Petroleum Marketing Act, S.A. 1973, c. 96 as amended S.A., 1979, c. 60.

25. Mines and Minerals Act, R.S.A., 1970, c. 238 as amended S.A., 1980, c. 76. See s. 135.1.

26. Section 21(1) covers the sale of the lessee's share of petroleum and the power of the APMC to establish the selling price and buyer. See note 24 above.

27. Quoted in Government of Alberta, *Harmony in Diversity: A New Federalism for Canada* (Edmonton, 1978), p. 6.

28. See text pp. 21–24.

29. Constitutional Amendment Act, 1978, Bill C–60, s. 98.

30. Government of Alberta, *Harmony in Diversity*.

31. The natural resources provisions of the 1979 "Best Efforts" Draft are reproduced as Appendix A.

32. *C.I.G.O.L.* v. *Attorney-General of Saskatchewan*, note 7, above.

33. *Central Canada Potash Co. Ltd.* v. *Government of Saskatchewan*, (1979) 88 D.L.R. (3d) 609 (S.C.C.)

34. Rowland J. Harrison, "Natural Resources and the Constitution: Some Recent Developments and Their Implications for the Future Regulation of the Resource Industries," *Alberta Law Review* 18 (1980), p. 9.

35. At the February 1979 First Ministers' Conference, the federal government and all provinces except Quebec and Alberta accepted the proposals.

36. The 1980 "Revised" federal position is attached as Appendix B.

37. Federal-Provincial Conference of First Ministers on the Constitution, 8–12 September 1980. "Notes for a Statement by the Prime Minister of Canada on Resource Ownership and Interprovincial Trade," (Ottawa, 1980), Document No. 800–141038.

38. "Premier Derides Concessions," *The Calgary Herald*, 9 September 1980, p. A-1.

39. Sections 57 and 58 of the Constitution Bill, 1982 which add s. 92A and Schedule 6 to the Constitution Act, 1867 (the BNA Act) are reproduced as Appendix C.

40. See *C.I.G.O.L.* v. *Attorney-General of Saskatchewan*, note 7, above. But see also *Smylie* v. *The Queen*, (1900) 27 O.A.R. 172 (Ont. C.A.)

41. See the "operations" and "effects" criteria stated by Beetz, J. *Reference Re Anti-Inflation Act*, note 11, above, at 458 (S.C.R.)

42. *Ibid.*, at 425.

43. Energy Supplies Emergency Act, S.C. 1978–79, c. 17.

44. See Herbert Marx, "Notes and Comments: The Energy Crisis and the Emergency Power in Canada," *Dalhousie Law Journal* 2 (1975–76): 446–54.

45. Constitutional Amendment Bill, 1981, s. 57 adding s. 92A(1)(b), see Appendix C. "Best Efforts" Draft, "Resources," s. 2(c), see Appendix A.

46. See *Smylie* v. *The Queen*, note 40, above.

47. "Relationship to Certain Laws of Parliament," s. 4(a), see Appendix A.

48. See analysis of "National Dimensions" in Gibson, "Measuring 'National Dimensions'."

49. See *Reference Re Anti-Inflation Act*, note 11, above.

50. See Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1979), pp. 103–14.

51. *C.I.G.O.L.* v. *Attorney-General of Saskatchewan*, note 7, above. *Central Canada Potash Co. Ltd.* v. *Government of Saskatchewan*, note 33, above.

52. See note 7.

53. Under the British North America Act, 1867, s. 125. See G.V. LaForest, *The Allocation of Taxing Power Under the Canadian Constitution*, 2d ed. (Toronto: Canadian Tax Foundation, 1981), p. 150; and Gerard V. LaForest, *Natural Resources and Public Property Under the Canadian Constitution* (Toronto: University of Toronto Press, 1969), pp. 162–63.

54. Alberta Natural Tax Reference, (1981) 28 A.R. 11 (A.C.A.)

55. D.E. Thring, "Alberta, Oil and the Constitution," *Alberta Law Review* 17 (1979): 78–81.

56. *Ibid.*, p. 76.

57. For example, having the right to drill for and to produce oil and gas, without having full ownership of that oil and gas while it is in the ground.

58. See Gervais, "The Nature of the Interest Granted Under Alberta . . . Leases."

59. "Ottawa Wants Almost Triple, Energy Study Says," *The Calgary Herald*, 30 September 1980, p. A–1.

60. Canada, Department of Energy, Mines and Resources, *The National Energy Program* (Ottawa: Minister of Supply and Services Canada, 1980), pp. 108–12.

61. Harrison, "Natural Resources and the Constitution," pp. 10–12.

62. As defined by Professor Hogg. See P.W. Hogg, "Definitions," Memorandum to members of Constitutional Change Project Co-ordinating Committee, 25 June 1979.

63. The federal-provincial oil-pricing agreement originally implemented 1 April 1974 and the Federal-Alberta Natural Gas Pricing Agreements that date from October 1975.

64. National Energy Board, R.S.C. 1970, c. N–6, s. 83, as amended R.S.C. 1970, c. 27, s. 2, supp. 1.

65. National Energy Board, Report to the Governor in Council, Q & M Pipe Lines Ltd., May 1980.

66. K. Beauchamp, M. Crommelin, and A.R. Thompson, "Jurisdictional Problems in Canada's Offshore," *Alberta Law Review* 11 (1973): 431–69.

67. See "Canada's New Government Assumes Key Energy Role," *Oil and Gas Journal* 78 (16 June 1980): 27–32.

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Constitutional Change and the Forest Industry

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Constitutional Change and the Forest Industry

Introduction

The forest resource is an imposing feature of life in Canada in both a physical and an economic sense. Forests cover approximately 341 566 700 hectares (844 000 000 acres) of land in Canada; that is, nearly 35 per cent of the entire country. Of this forest land nearly 1 750 000 hectares (430 million acres) is economically productive.[1] A 1978 study tells us that over 14 per cent of value added in all Canadian manufacturing originates in the logging, wood, pulp and paper, and allied industries.[2] The same source reports that: "Although Canada accounts for only 5 per cent of total world wood production and 10 per cent of the industrial roundwood harvest, Canadian forest-product exports are very important in world trade. Canada is the leading exporter of softwood lumber, chemical wood pulp and newsprint."[3] Canada's contribution to total world export of these three wood products is 30 per cent, 40 per cent, and 65 per cent respectively.[4] In 1977 Canadian forest-product exports amounted to $7.9 billion or approximately 18 per cent of the value of *all* Canadian commodity exports.[5] A 1979 article in *Readers Digest*, commissioned by the Canadian Institute of Forestry, concluded: "[The forest industry] earns more foreign exchange than the combined exports of oil, gas and coal; twenty-five per cent more than agricultural products; ten times more than fisheries."[6]

In 1976 approximately 288 000 people were employed directly in the forest industry in Canada and earned approximately $4.1 billion.[7] When all backward and forward linkages are considered, Reed and Associates estimate that a total of "900,000 Canadians owe their livelihood to the forest industry."[8] Furthermore the forest industry is an important factor in the economy of *all* provinces, except Prince Edward Island.

Unfortunately all is not well within this extremely important resource sector. Wood, unlike minerals, is a renewable resource that if properly managed can provide employment and revenue indefinitely. Until quite recently, however, harvesting has had more in common with mining than with sound forest management. The 'rotation period' of trees (that is, the time it takes to grow a mature crop suitable for harvesting on a sustained yield basis) averages sixty to eighty years; hence errors made many years ago can have disastrous consequences today. Concerned foresters and economists are now telling us that this is exactly what has happened in Canada. The Canadian Institute of Forestry article mentioned above concluded: "It is hard to believe that Canada of all countries, is facing a shortage of wood . . . Shortages of economically accessible timber, already critical in several mill towns across the country, threaten to become general by the end of the century. . . Quite simply, suitable timber is disapppearing faster than it is growing back. There are plenty of trees out there, but they are often the wrong species, poor in quality, or too far from the mills."[9]

Most, if not all, of this shortage is attributable to a predictable 'falldown' phenomenon that occurs when the industry exhausts supplies of old growth timber and begins to harvest second growth forests on a sustained yield basis. Old growth timber yields substantially higher volumes of wood than second growth timber because the older trees have been growing for a much longer period of time. If something is not done to counter the effect of falldown, the consequences will be severe for the entire Canadian economy; they will hit hardest the many people who will lose their jobs and the communities that will lose their main source of economic activity. F.L.C. Reed and Associates, in a 1978 report prepared for the Canadian Forestry Service,[10] advocates a major program of "intensive forest management" across Canada as the best method for maintaining yields in spite of a natural falldown. A major program of capital investment in the form of silvicultural methods like direct seeding, tree improvement, thinning, and fertilization could, it is estimated, lead to gains of 40 to 100 per cent over natural forests in terms of merchantable timber.[11]

Many analysts would like to see a true national forest policy emerge in Canada so that common goals could be articulated and a well co-ordinated and comprehensive effort could be mounted to protect and enhance the crucial function of this resource in the Canadian economy.[12] It is clear that intensive forest management would fulfil a major function in a national forest policy, but observers have pointed out that there are many other aspects of forest-sector management that require immediate attention.[13] Even apparently unrelated areas like education, manpower, and unemployment insurance have forest-policy implications.

The reader may well be wondering what connection there is between problems in forest management and constitutional arrangements. Some analysts contend that the existing institutional framework in Canada contributes substantially, directly or indirectly, to the problems facing Canada's forest sector today. A 1978 article in the *Journal of Forestry* stated:

> Reed and his associates submit that the most important impediments to forest management are institutional in nature and include tenure, funding, jurisdictional rivalry between provincial and federal governments, and the lack of policy formulation and strategic planning. Further, they suggest that the root of the vacuum in policy and planning is the failure of senior governments to cooperate effectively . . .
>
> In sum, forestry in Canada has suffered from the inadequacy of government organization and the adversary relationship of federal and provincial governments inherited from ambiguities in the BNA legislation.[14]

Apart from this general fragmentation, some specific examples of constitutional problems in the forest sector come to mind.

The British North America (BNA) Act[15] distributed the lion's share of legislative jurisdiction over Canada's forest resources to the provinces, but allocated considerable authority over fisheries to the federal government and thereby created a critical interface with a high potential for controversy. Forest operations at all stages, including falling, storage, transportation, and processing, have negative impacts on fish and their aqueous environment. The potential for conflict became actual in the spring of 1979 in the Queen Charlotte Islands of British Columbia, when the federal Department of Fisheries arrested certain loggers who were operating on the basis of a cutting permit issued by the provincial Ministry of Forests.

Another major source of controversy stems from federal power to tax and spend. It is estimated that in 1977 the federal government earned some $835.6 million from taxes and levies on forest-related incomes and transactions.[16] The segment of federal revenues earned from the forest industry in British Columbia alone was approximately $307.5 million.[17] Yet federal expenditures on forestry in that year were approximately $73.6 million throughout Canada; of that sum, a mere $0.3 million was spent in British Columbia.[18] It should be recalled that intensive forest management requires significant levels of capital investment. Again, in 1977, the Government of British Columbia earned approximately $378.5 million from the resource, while its expenditures were approximately $125.2 million.[19] It does not seem fair for a provincial government to have reinvested almost one third of its earnings from the forest sector, while Ottawa returned less than one thousandth of what it received. There has been some increase in the federal contribution in recent years. When the federal government does invest funds, however, a frequently heard complaint is that the resulting programs, even when jointly undertaken with the provinces, represent an improper incursion into provincial fields of jurisdiction.

The power to control and tax exports leaving a province is another issue that raises constitutional questions for the forest industry. British Columbia is extremely concerned with promoting industrial development and employment within the province. One method of achieving this goal is to impose restrictions on unprocessed timber and wood residue leaving the province.[20] There is probably nothing unconstitutional in requiring that timber cut from provincial Crown land be manufactured in the province,[21] but problems may be created by allowing for exemption from this requirement. The province reserves the right to grant an exemption from the manufacturing requirement and to charge a fee for the exemption. This fee is challengeable constitutionally on the grounds that it is not a direct tax "in order to the raising of a revenue for provincial purposes."[22] Furthermore, if the fee were seen by the courts as fixing the price of a commodity destined primarily for international or interprovincial markets, it would be open to challenge on the ground that it constituted an invasion into federal jurisdiction over trade and commerce.[23]

The federal government owns some forested land within the provinces: that is, Indian lands held in trust for the Native people living there, and national parks. British Columbia does not attempt to control exports from these federal lands or from most privately owned lands. Ottawa exercises its own export controls that parallel provincial regulations and are administered in co-operation with the province.[24] The federal controls apply to timber cut from all land within the provinces that is going to foreign markets.

The provinces have several means of regulating the structure of the forest industry, which has a strong tendency toward concentration into very few hands. Some of these means interfere with the interprovincial flow of capital. In early January 1979, for instance, Premier Bennett of British Columbia personally blocked a bid by Canadian Pacific Investments (C.P.I.) of Montreal to take over control of MacMillan Bloedel, the largest forest company operating in the province. Exactly what leverage the Premier brought to bear on C.P.I. was never made explicit, but rights to Crown timber must have figured prominently in the discussions that took place. Premier Bennett probably threatened to terminate cutting rights in provincial forests.

Further, through a combination of legislation and licence terms, the B.C. government influences the complexion of private industry in the province. Certain forest tenures are made available only to smaller operators, while other tenures, normally granted to larger companies, require the licensees to retain independent contractors to harvest a portion of the timber allocated under the licence. Moreover no Crown tenure may be transferred or assigned without the consent of the Minister of Forests. The sale of a control block of shares in, and the corporate amalgamation of, companies holding Crown tenures are considered to be sales of the forest rights themselves and to require ministerial approval.

Clearly any of the devices mentioned above can be utilized to favour operators based in British Columbia over extraprovincial concerns. However, from a constitutional point of view, little can be said to impugn such uses of provincial power.[25] Section 121 of the BNA Act only guarantees the free interprovincial movement of goods and produce, not that of capital. In the eyes of some observers, however, such tampering with normal interprovincial business makes a mockery of nationhood. Although the use of provincial power to prevent investment by residents of another province in provincially owned resources might constitute an incursion into federal jurisdiction (for example, trade and commerce), it is more likely to be seen merely as provincial management of its own property.

In the late 1970s and more recently, there has been a flurry of activity in relation to the forest resource. Professional foresters, economists, and industry members have expressed strong criticisms and recommendations. Major studies, such as the British Columbia Royal Commission on Forest Resources[26] and the two Reed reports,[27] are focusing these concerns. The federal government has responded by allocating more funds to the resource through the Canadian Forest Service and the Department of Regional Economic Expansion, but the industry continues to experience long-term difficulties.

Jurisdictional issues relating to natural resources are considered by many Canadians to be as significant in terms of Canada's future as the issue of political and cultural autonomy for Quebec. Together these issues are straining the federation to its limits. Should our constitutional distribution of powers be changed in the near future, the impact on the forest industry must be given serious and careful consideration. In the following sections of this paper, we shall speculate on how the adoption of four particular constitutional options might affect the existing pattern of forest-sector management in Canada.

Full Sovereignty for Quebec with No Special Form of Association with Canada

The elements of full sovereignty for Quebec are simple and clear. Quebec would be a sovereign country in full control of all policy tools. Any ties with Canada would be established diplomatically, and each state would be motivated primarily by self-interest. The relationship between Quebec and Canada would be similar to that between Canada and the United States. Being close neighbours with similar economies and concerns, all three states would probably continue to co-operate. However, the Canada-Quebec relationship would differ in two important respects from the Canada–United States relationship. First, the United States has far more bargaining power than Quebec in dealings with Canada, and secondly the American economy is more efficient. Furthermore Canada would probably have more bargaining power in dealings with the United States than would Quebec.

If Quebec should separate, a puzzling issue remains: What would become of the Canadian federation? It is almost impossible to predict how the remaining provinces might react. The federation might become more centralized, although that development would be contrary to the trend of recent years. Alternatively, other provinces or regions might decide to follow Quebec's example of independence or even to merge with the United States.

On the assumption that the structure of federation would continue unaltered, it has been contended that:

> The Western Provinces would gain immensely if Quebec were to separate. Then, the Western and Atlantic Provinces would out-vote Ontario in the House of Commons. Free trade with the United States would become attainable and Ontario might have to allow the other provinces to control the railways . . . The provinces could assert their rights to draw revenue from and to control completely the development and management of their natural resources. If decisions were made solely as dictated by hard-nosed calculations of self-interest, the Western Provinces would secede unless they were offered sufficient bribes to make it profitable to stay in the federation. The bribes would have to be substantial.[28]

It is safe to assume that if Quebec separated from Canada and no form of economic association were established between the two entities, it would be very difficult for Canadian forestry personnel to work in Quebec, and vice versa, during times of excessive availability of manpower.

In Quebec all federal activities and funding relating to post-secondary education, employment training, job placement, and unemployment insurance would cease. Quebec would take over all aspects of these social services. All internal sources of tax revenue would be available to the new country to finance such programs, but federal equalization payments would be lost. If the analysts are correct who tell us that Quebec is a net beneficiary under the existing system of federal spending, then social services in a sovereign Quebec would cost the citizens of that state more, while the cost of such services to Canadians would drop. Of course any changes in efficiency resulting from separation, such as reduction of overlap, would be likely to mitigate these tendencies.

More than likely, employment, education, and unemployment policies within a sovereign Quebec would be more sensitive to the needs of the forest industry in that province.[29] Similarly, by virtue of the political shift within Canada described in the quotation above, federal personnel services would probably also become more closely related to regional economic conditions and needs in the truncated Canada.

By separating, Quebec would gain full control over all natural resources within its borders. All federal lands would be taken over, and Quebec would gain full proprietary and legislative control over intraprovincial fisheries. The extent of Quebec's control over the coastal fishery would depend on its success in negotiating with Canada seabed boundaries in the adjacent offshore areas. With unified control, forest planning and management within the province should be more homogeneous, and bureaucratic overlap should be reduced. Environmental protection measures would be unified, as well, so that regulation of forest operations would avoid the complications that now exist in Canada. On the other hand, Quebec would lose the benefit of federal spending for forest management and research (for example, Canadian Forest Service operations in the province, or Department of Regional Economic Expansion grants), although it would have in its control greater tax revenue with which to make up the difference.

Clearly separation would exclude Quebec from direct participation in any Canadian national forest policy. Of course what is learned from the Canadian experience would be available to the new country and vice versa. There is no reason whatever to suppose that scientific exchanges between the two countries would cease. The achievement of a viable national forest policy in what remained of Canada would probably be made easier by the separation of Quebec. With fewer governments to disagree with one another, a national forest policy should be less difficult to achieve.

Transportation of forest products between Canada and a sovereign and 'dissociated' Quebec, to the extent that it goes on today, would be substantially altered. Products and vehicles crossing national boundaries would probably be subject to trade barriers, special charges, and licence requirements. Rail rates between Quebec and Canada would more than likely be altered. In fact the structure of rail rates within what remains of Canada would also be likely to change — in favour of the Western provinces.[30] To the extent that Canadian producers and Quebec compete in the same Canadian markets for forest products, alterations in Canadian transportation policies would work against a sovereign Quebec. If Canada could bargain for preferred transportation treatment in the United States, a small competitive advantage would be given to Canadian forest products in the American market.

It has been claimed that pulp and paper is Quebec's largest export industry.[31] But it is losing its competitive position in the American market, not to other Canadian producers, but to operators in the southern states.[32] Quebec's problem is obsolescence and lack of new capital investment. It has been suggested that a sovereign Quebec would actually become more competitive in this crucial market because "if Quebec were an independent monetary unit, the external value of its currency could be allowed to decrease sufficiently to offset the deteriorating competitive position of much of Quebec industry, not only in relation to competitors in foreign countries but also to those located in other provinces."[33]

Because the prime markets for their products are outside Canada, the forest sectors in most provinces today are not always sensitive to federal economic policies. They are often affected equally, if not more, by changes in American economic policies. For instance, changes in the American interest rate affect the market for Canadian forest products more than do Canadian interest-rate changes. A major exception to this phenomenon is policy governing the exchange rate of Canadian currency.

The constitutional validity of provincial export controls and manufacturing requirements would cease to be an issue for Quebec if that province separated, although it would continue to be one in British Columbia. On the other hand, separation would allow federal export controls to be applied against forest products leaving Canada for Quebec, and import controls might be applied to Quebec forest products entering Canada.

Sovereignty would give the new Quebec government full fiscal control within its territory. For the first time there would be no constitutional barriers to the new state's full assertion of its financial interest in resource rents and profits. Fiscal policy within a sovereign Quebec would probably be simpler and more attuned to local needs than it is now. Ottawa would lose a major source of tax revenues, and Quebec would lose federal spending in its various forms. Quebec is a net recipient under the existing system of equalization. The Parti québécois contends, however, that other provinces, especially Ontario, have benefited more from the kind of federal spending that encourages economic development.[34] In addition Quebec and most other provinces insist that conditional grants received over the years from the federal government were as much an intrusion as they were a benefit.[35] It is also quite possible that separation would eliminate costs associated with bureaucratic overlap and inefficiency to the extent that some of the lost federal spending would be offset. Further, perhaps, full fiscal control would encourage the Government of Quebec to increase investment in intensive forest management in the province.

Separation would end federal activities in the realm of research and development in Quebec. The Canadian Forest Service's Laurentian Research Centre would be closed. Co-operative research ventures would also be affected by separation, but they would not necessarily cease. To the extent that federal research and development activities were ended in Quebec, there would be more funds available for Ottawa to spend in the other provinces.

A sovereign Quebec would have all the tools necessary for complete control of competition, foreign investment, and corporate practices within the province. On the other hand, Canadian foreign investment laws would apply to Québécois seeking to invest in the remaining provinces. Provincial barriers to investment from outside would be exercised even less sympathetically toward a sovereign Quebec than they are now.

Sovereignty-Association

This constitutional option is really just a particular variety of sovereignty. The Quebec government's white paper tells us that, under sovereignty-association, Quebec would retain all the political, legal, and fiscal independence associated with full separation; as two fully sovereign states, however, Canada and Quebec would agree to adopt certain common institutions and policies that would relate, for the most part, to economic matters.[36] The key elements of association would be a common market and monetary union. Quebec's association with Canada would be governed by a "treaty of community association"; the interpretation and application of this treaty would be determined ultimately by a special court of justice. Of course representatives from Quebec would cease to sit in the Canadian Parliament.

Again, it is difficult to foresee how such an arrangement between Canada and Quebec would affect relationships between the remaining partners in Confederation. It seems inevitable that at least some of the provinces would demand a greater degree of autonomy from the central government. More important, it is unlikely to the highest degree that the remaining provinces would become willing partners in an association that gave Quebec greater decision-making authority than they themselves exercise over key, association-wide, policy areas like tariffs, the central bank, and transportation.

The choice of this particular constitutional option would have an impact on the forest industry similar in many respects to that of full separation. If a treaty of community association similar to that outlined in Quebec's white paper were agreed on, it is unclear exactly how that would affect the ability of Canadian forestry personnel to work in Quebec, and vice versa. Although Canadians and Québécois would be permitted to travel freely across an unpoliced border, regulation of the labour market would be a matter reserved for negotiation in a special agreement.[37] It must be assumed that both partners in the association would bargain for labour mobility only to the extent that their own constituency would benefit. The result would probably be restrictions in mobility related to certain jobs and sectors at certain times.

In theory there is no reason why joint bodies could not be set up to administer manpower and employment programs in the association. In reality Quebec is particularly protective of social service programs and is unlikely to agree to anything of the sort. It can be safely assumed, therefore, that an associated, but sovereign, Quebec would control its own manpower and employment programs in a manner similar to that discussed with respect to full sovereignty — a manner, that is to say, entirely concerned with internal needs and priorities.

Forest planning, management, and regulation in Quebec and the Canadian provinces would probably not be significantly affected by the treaty of association; any impact in this area would flow exclusively from sovereignty, as discussed in the preceding section. An association-wide forest policy is extremely unlikely, but not impossible. Furthermore Quebec would almost certainly choose to regulate environmental and fisheries matters alone, with the possible exception of trans-boundary problems.

Transportation is another area the white paper reserves for special agreement between the two associated countries.[38] Of particular interest is the reference in that paper to possible "joint management of public carriers such as Air Canada and Canadian National."[39] The authors of the white paper were strongly critical of rail transport in the existing federation:

"Only 12% of the Canadian railway network is in Québec; Québec has only 0.9 miles of railway per capita compared to the Canadian average of 2.1 miles; and products entering or leaving Québec are subject to rail rates about 40% higher than the Canadian average."[40] If special transportation agreements are negotiated, one can expect very tough bargaining on Quebec's part.

As Canada already has a common market, it is difficult to see how its continuing to operate with a sovereign Quebec could significantly affect existing trade patterns. Free trade within the common market would not by itself alter the amount of business now done in Canada by the forest industries of Quebec and the other Canadian provinces. As to foreign markets, whether Quebec's posture with respect to international trade policies and agreements would coincide with the interests of the other provinces that export forest products would depend on whether Quebec production was already at or near maximum. If it were, Quebec would probably seek no more than to protect its market share, a position unlikely to receive a sympathetic response in the Western provinces.

A common currency within the association would maintain the convenience and low transaction costs of existing Canadian trade patterns. It would also tie together the financial destinies of the association's partners by means of a common exchange rate. This could have negative implications for Quebec's obsolescing pulp-and-paper-processing facilities. As noted above, it has been contended that a separate currency might be preferable for Quebec because it would enable the province's declining competitiveness on the world market to be offset by monetary devaluation.[41]

Under sovereignty-association Quebec would elect to keep complete sovereignty over fiscal matters. As a result it is likely that total investment in intensive forest management would increase. If this form of investment really is urgently required, the Government of Quebec would have no one to blame but itself for a deficiency.

If this option were implemented, federal in-house research currently conducted in Quebec would cease, at least in its present form. Research is, however, a highly suitable avenue for co-operative effort. Not only do existing joint ventures of this sort stand a good chance of continuing in a régime of sovereignty-association, but it would not be surprising to see new ones begun.

The Quebec government's white paper suggests that capital should move freely within the monetary union, subject only to the entitlement of "each party . . . to proclaim an investment code or to adopt, if need be, particular regulations applicable to certain financial institutions."[42] What is meant by 'each party' in the excerpt quoted above is unclear. Currently each province has a securities code, and the federal government may soon have one, too. When the white paper speaks of 'each party', it is apparently referring to the other provinces as well as to Ottawa. If this is so, then no major problem or change from the present situation would be likely to occur. On the other hand, if 'each party' means only the two sovereign states, Quebec's investment in the provinces would be controlled only by a single federal enactment. Such an eventuality would undoubtedly sit very poorly with the Canadian provinces.

Laws applying to the review of foreign investments would not apply to screen the movement of capital entering Canada from Quebec. The only exceptions to the principle of free movement of capital cited in the white paper refer generally to the regulation of securities and to financial institutions. The protection of provincially based forest companies and their Crown-timber holdings does not fit within either exception. Therefore, in principle, it would appear that protectionist tendencies, such as those practised by British Columbia's government in 1979 in relation to the attempt by C.P.I. of Montreal to take over MacMillan Bloedel, would be contrary to the treaty of association.

Special Status for One or More Provinces

Special status is a concept that has evolved in relation to the Province of Quebec. For obvious reasons that province has always enjoyed a measure of particular status *vis-à-vis* the rest of the country. In the 1960s, however, it was proposed that a major systematic adjustment be made so that the distinctive national aspirations of Quebec could be accommodated more appropriately within the Canadian federation.

In 1968 the thrust of this constitutional option was summarized in four main points as follows:

> First, under this proposal the government of Quebec would assume full responsibility for most if not all federal-provincial programs and would receive from the federal government a fiscal

> transfer which would fully compensate the province. The government of Quebec would similarly be compensated for new federal-provincial programs — such as medicare — whether or not the province undertook a program similar to that required in other provinces. Secondly, the government of Quebec would under this approach assume responsibility for certain purely federal programs, principally the family allowance and old age security income maintenance programs, and again would be compensated by means of a fiscal transfer from the federal government. Thirdly, the government of Quebec would be given the right to be consulted in respect of other federal policies, including fiscal, tariff and trade policies, and probably monetary policy. . . Fourthly, the government of Quebec might expect to assume certain aspects of federal jurisdiction, such as the right to conclude international arrangements, at least in fields of provincial jurisdiction and certainly to develop something of an international personality.[43]

The major flaw with this type of arrangement, as with sovereignty-association, is that the provinces not given special status are unlikely to agree to the change unless they are offered at least the option of receiving the same benefits themselves. This attitude is reflected in *British Columbia's Constitutional Proposals*:

> British Columbia cannot accept a distribution of powers in which a major feature is the granting of some subject matters to some provinces and the denial of those matters to other provinces. British Columbia believes that a Constitution containing broad special powers to be exercised by only one or a few provinces is alien to the original rationale of Confederation, namely the legal equality in law-making terms of all the provinces. British Columbia believes that this equality should be maintained. If certain provinces then acquire a *de facto* special status by exercising or failing to exercise powers which all provinces have, British Columbia would not complain.[44]

Special status would not directly alter the mobility of the labour force throughout Canada. It is conceivable, however, that the province enjoying special status might attempt to exercise indirectly its right of consultation concerning federal programs that affect mobility, such as unemployment insurance and employment resources. There is also a possibility that the province would assume responsibility for providing such programs within its borders.

Provincial control over management, harvesting, and marketing of the forest resource would not be affected appreciably by adoption of this constitutional option because provincial control is already dominant in these areas. It is uncertain whether Ottawa legally could and, if so, whether it would transfer to the province enjoying special status ownership of Indian reserves and national parks and legislative authority over them. The province in question would probably seek to gain full legislative control over fisheries and environmental protection. If it failed in this objective, it would likely seek to influence federal policies through consultation before any major decisions that affected the province were made in these realms. This constitutional option would not create barriers to the establishment of a national forest policy, especially if the province with special status stood to benefit from the change.

It seems that every province and region, except perhaps Ontario, is dissatisfied with the existing system of rail transport in Canada. Undoubtedly a province that enjoyed special status would seek to exercise its right of consultation in relation to national transportation policy.

Special status would give a province much greater influence in a wide range of areas including trade, monetary, and regional economic policies: "Special status in the field of regional economic policy . . . could come to mean the use . . . of a whole range of special powers for the purpose of influencing its industrial and resource development . . ."[45] Obviously this would be of great potential benefit to the forest sector of the province that enjoyed special status and unfair to the industry in the rest of Canada. Nevertheless, under this constitutional régime, the marketing of forest products would probably not change dramatically. Trade patterns in export markets that absorb most Canadian timber products would not be altered significantly.

The adoption of this constitutional option would have major consequences for fiscal arrangements in the special status province. Most, if not all, the power to tax corporate and personal incomes would be transferred to the province. Further, federal payments to the government of that province would continue or increase, but all spending restrictions would be eliminated. Clearly there would be more than a little difficulty in getting the other provinces to accept such a state of affairs.

If these arrangements were implemented, the special status province would be in control of very powerful fiscal tools that could be tailored to the specific needs of that province. A certain degree of fiscal independence for all provinces makes sense in a country like Canada with such distinct economic areas. The forest industry in particular might stand to gain from provincial fiscal autonomy. We have seen that the revenues derived by Ottawa and the provinces from forest operations seem out of balance with government investment that is needed in the resource. As with the options of full sovereignty and sovereignty-association, special status would present fewer impediments to the striking of a healthy equilibrium between public forest revenues and investments in the province with special status. Of course those provinces not benefiting from special status would still have to contend with existing jurisdictional fragmentation. When special status for Quebec was a topical subject, the question was asked: "Would there arise in the minds of other provincial governments, for example, the question as to whether Quebec was in a position to combine its special fiscal status with the equalization payments, towards which the citizens of the other provinces contributed, to finance competitive tax or expenditure incentives to industry? Put more generally, would intergovernmental arrangements, under which all provinces benefit and contribute equally, persist, or would special fiscal status enjoyed by one provincial government force a readjustment designed to bring into balance the fiscal power and the fiscal responsibilities of all governments?"[46]

A province enjoying special status would still be a part of Canada; hence in-house, federal, research-and-development efforts would likely continue in one form or another.

Since a special status province would still be part of Canada, it would continue, when investing in other parts of Canada, to be both immune to federal foreign investment restrictions and exposed to provincial controls. It seems that as long as a province is exercising a legitimate provincial power, such as the management and sale of publicly owned resources, it can lawfully control extraprovincial investment. A province enjoying special status would have an even larger array of tools for directing investment patterns within its borders.

Renewed Federalism: Rearrangement of Division of Powers and Government Institutions within the Current Federal Structure

Several concrete proposals for a rearrangement of the distribution of powers have been put forward by groups like the

Canadian Bar Association,[47] the Quebec Liberal Party,[48] and the federally appointed Task Force on Canadian Unity.[49] These proposals all share, to a greater or lesser extent, the view that a renewed Canadian federation should consist of strong provincial governments coexisting with a strong central government. We are restricting this analysis to a consideration of a restructured constitution compatible with this 'strong central government – strong regional governments' approach.

Generally such proposals call for the exclusive assignment of areas of clear national concern to the federal government. Such areas would include: control of the Canadian economy through monetary policy, interest rates, tariffs, and trade; enhancement of Canadian identity; redistribution of income; equalization of economic regional disparities; defence; national standards; and the power to make and implement international treaties. Similarly areas of clear provincial concern would be allocated to the provinces: these are social and cultural policy, regional economic development, the well-being of regional communities, extensive control of natural resources and property and civil rights. All constitutional restrictions on provincial taxing power would be removed, except with respect to customs and excise taxes and perhaps other levies that have a significant impact on residents of other provinces. Powers necessary for the cultural integrity and national aspirations of particular regions would be made available to all provinces, with the option of not exercising them. Means of increasing consultation between all governments would be encouraged and institutionalized under this approach. A new interprovincial body (that is, a reconstituted Senate) would be set up to act as a forum for such consultation and, more significant, to give the provinces a power of ratification or rejection with respect to certain federal policies and programs likely to have a palpable impact on the regions of Canada.

For the purpose of predicting the likely content of this option, we intend to rely, for the most part, on the Quebec Liberal Party's *A New Canadian Federation*.[50] The proposals in this document are by far the most detailed of those put forward to date. They also represent what is probably the most provincially oriented approach to the option being considered.

The Quebec Liberal Party's proposals suggest that the provinces should have exclusive jurisdiction over "social insurance," defined to include programs like unemployment insurance, government pension plans, and workers' compensation. *A New*

Canadian Federation also tells us that Ottawa has "no role to play" in the area of education, which is seen as including universities, grants and bursaries, employment training, and the regulation of trades and professions.[51] Under this approach the only tool the federal government would wield in relation to social services and education would be the spending power. But expenditures slated for such purposes would first have to be approved by a new interprovincial body, the Federal Council. The Canadian Bar Association, in making its proposals, did not think it advisable to remove unemployment insurance from exclusive federal jurisdiction, but did recommend placing restraints on the federal spending power.[52]

Both these reports call for the guarantee of free movement of people, goods, and capital, and of the right to work in the province of one's choice. The Quebec Liberals would buttress this right with guarantees against discrimination in the areas of social insurance, health, and social services.[53] Newcomers to a province would therefore be entitled to the same services available to long-time residents.

The recommendations of the Quebec Liberal Party would have a significant impact on the way programs and services affecting forestry personnel are structured. The major change likely to be felt by recipients of government services would probably be the loss of portability of benefits. Individuals would continue to receive benefits like unemployment insurance and employment training, and to be entitled to enjoy similar services throughout the country, but they would be subject to regional differences in such matters as eligibility requirements and benefit scales. The major difference, from a forestry perspective, would be that each province would be better able to harmonize educational, employment-training, and social insurance programs with local economic and industrial policies. It is to be hoped that this change would result in educational and other training programs better suited to the changing requirements of the forest sector: that programs would, for example, be better framed to meet current requirements for providing personnel with skills related to intensive forest management.

Under this approach to federalism, professional foresters, like doctors, engineers, and lawyers, could move freely from one province to another. But all professionals would be required to meet the same professional standards applied to those already practising in the area.[54]

All of the proposals agree that the provinces should retain ownership of resources in their territory and legislative control over resource exploration, exploitation, conservation, and management. Both reports appear to accept the continuation of some federal land ownership within the provinces. Hence it is probably safe to assume that Ottawa would continue to own and manage the forest resources on Indian lands and in national parks, subject to the likelihood that Native management and control of Indian lands will increase because Native organizations are demanding a greater degree of self-determination.

All in all, provincial dominance in the area of forest planning, management, and regulation would be slightly strengthened by this approach to federalism; but several crucial indirect controls over these facets of natural resource exploitation would be left with the federal government. Even the Quebec Liberal Party's position allows for fairly wide federal control over interprovincial and international trade and commerce.[55] The federal government would also continue to exercise wide powers in relation to the national economy. In fact *A New Canadian Federation* recommends that a new constitution should *oblige* Ottawa, in conjunction with the provinces, to develop long-range plans for the general economic development of the whole country: "The constitution should make [the federal government] responsible for the concertation [*sic*] of policies and actions in the natural resources sector and particularly in the field of energy."[56] The Constitutional Committee of the Quebec Liberal Party may have had energy resources in mind when it drafted the passage quoted above, but the sentiment expressed is directly applicable to a national forest policy.

It must be recalled that any major federal programs relating to provincial resources would be subject to provincial approval under the new arrangements. Furthermore the provinces would have more in-put than ever in the development of federal economic policies likely to affect provincial resource management.

Both reports recommend that proprietorship and legislative authority over *inland* fisheries be vested exclusively in the provinces, although the Canadian Bar Association has reservations concerning anadromous species.[57] Adoption of this suggestion would eliminate the controversial division of jurisdiction between provincial forestry authorities and the federal Department of Fisheries and Oceans concerning the regulation of log cutting and transportation. The provinces would have full legislative and administrative control over inland fish. They would no longer have to rely on a delegation of authority from the federal government to protect and manage this resource. Some commentators argue that because the forest resource is more valuable to the provincial economy than to the national economy, a provincial fisheries department would be under pressure to engage in trade-offs detrimental to the fishery. It can also be argued that this sort of resolution of resource-use conflicts would result in a better realization of all resource values.

The Quebec Liberal Party recommends that the central government have full jurisdiction over fisheries[58] and environmental protection in *interprovincial and coastal* waters.[59] These proposals also reserve a function for federal criminal sanctions to be applied whenever and wherever serious forms of pollution pose a threat to health or property.[60] All the same, the provinces would probably continue to exercise some control, through foreshore leases or cutting permits, over operations like booming, storage, and processing that cause pollution in coastal waters.

The Quebec Liberal Party's proposals strive to eliminate jurisdictional overlap in the area of environmental protection and fisheries. All the same, it is difficult to believe that some degree of controversy and confusion would not remain.

Under the proposed federal structure, road transportation would remain within exclusive provincial jurisdiction.[61] Rail transport would continue to be regulated as it is today: that is, Ottawa would have jurisdiction over interprovincial lines, and the provinces would control intraprovincial lines.[62] Increased consultation among all governments concerned might resolve some of the objections that have been expressed over the years in relation to national rail transportation. The Quebec Liberal Party suggests that the federal government should continue to control navigation in all navigable waters within and outside provincial territory.[63] All log booming would, therefore, continue to be subject to federal navigation controls.

The Canadian Bar Association recommends that provincial authority include the power to place quotas on provincial resource exports and to require that a resource be processed in the province.[64] The provinces currently exercise this sort of power, but mainly in relation to the property they own. The Canadian Bar Association advises that there should not be any constitutional limitations preventing provincial export controls from being extended to resources produced from private land.[65] Adoption of this proposal would entrench existing provincial policies requiring timber cut from Crown land to be manufactured before leaving the province and extend them to timber produced from all fee-simple lands within the provinces. However, both the Canadian Bar Association and the Quebec Liberal Party would object to the provincial imposition of export taxes on resources leaving a province.[66] Hence the fee authorized under the British Columbia Forest Act on logs and chips exempt from provincial processing requirements would continue to be of questionable legality.

If this constitutional option were implemented, Ottawa would continue to dominate the field of international and interprovincial trade and commerce. Consequently federal export controls presently applied to unprocessed timber products leaving the country would not lose their jurisdictional basis. Tariffs and trade treaties would also continue to be controlled by the central government, although provincial consultation would be increased.

All the proposals for a renewed federalism recommend that guarantees for unrestricted interprovincial trade be strengthened. Presently section 121 of the BNA Act is applied narrowly so that only fiscal impediments to trade are considered unconstitutional. The Quebec Liberal Party recommends that trade within Canada be genuinely free. However, as the proposals recommend that the provinces have jurisdiction to control exports from their territories, guarantees for free trade relating to natural resources would be restricted to preventing discrimination by importing provinces. The Quebec Liberal Party's proposals suggest: "Free trade between the regions presupposes that the provinces will not erect tariff barriers or any other obstacle to the free circulation of products and services across the country. They will also avoid favouring, in a discriminatory way, their local businesses and producers, to the detriment of those of all other regions of the country."[67] With such a guarantee entrenched in the constitution, all discriminatory government practices would be forbidden. For example, a program initiated by the Government of British Columbia in 1980 would probably be unconstitutional. That government set aside $200 million to be made available to British Columbians seeking mortgage funds, at rates well below 'prime', on the strict condition that all lumber used in the construction for which the loan was made be of provincial origin.

This general approach to constitutional reform would effect important changes in existing fiscal arrangements. In the first place all restrictions on the provincial power of taxation would be lifted, except for those on tariffs and customs duties.[68] Moreover property taxes would be exempt from the otherwise comprehensive federal powers to raise revenue.[69] Because Ottawa would retain the jurisdiction to use fiscal policy to maintain national economic stability and equity, no further limits would be put on its power to raise revenue.[70]

The function of the federal spending power would remain prominent in a renewed federation. In fact the constitution would impose a positive responsibility on Ottawa: "To redistribute wealth, so as to reduce disparities and encourage equality of opportunity between the regions of Canada . . ."[71] All the same, serious limitations would be placed on the exercise of the spending power. According to the Quebec Liberal Party, all federal expenditures for purposes within provincial jurisdiction would be subject to meaningful consultation and ratification in the Federal Council.[72] Furthermore any province would be entitled to opt out of a program ratified by the Council with full compensation.[73] Equalization payments and regional economic expansion programs would both be subject to these controls.

The Quebec Liberal Party also recommends that the pattern of taxing and spending authority be structured according to the principle of 'fiscal responsibility', which requires that the tax revenues of both levels of government correspond to their respective responsibilities.[74] This principle would not be entrenched in the constitution, but would serve as a basis of negotiation now and in the future. Such a principle would provide good leverage for provinces seeking to expand their share of tax revenues from the forest and other resource sectors.

If these fiscal recommendations were, in fact, implemented, the provinces would have only themselves to blame if regional forest sectors did not benefit from the change. In the first place, the provinces would have greater revenues to spend for provincial purposes. Secondly regional fiscal policy should be more in tune with local development priorities, including those of the forest sector. Furthermore federal policies and programs would likely be more sensitive to regional viewpoints because provincial governments would participate more in national decision making.

A New Canadian Federation recommends that jurisdiction over research should follow other areas of constitutional authority:

"The federal government, for example, must be able to direct or finance its own research in matters related to national defence or to monetary or international policies. The same is true for the provinces in matters of housing, *natural resources*,[75] land-use and planning, agriculture and manpower, to name but a few of their jurisdictions."[76] This set of proposals would still allow for future federal research programs in areas within provincial jurisdiction, but the necessary expenditures would be subject to provincial approval. The report allows for the continuation of existing federal research bodies concerned with the social and medical sciences,[77] but no mention is made of resource research or of the National Research Council. Existing federal in-house forest-research operations would therefore have an uncertain future if this constitutional option were adopted. There would remain much room, on the other hand, for co-operative or concerted efforts. These recommendations also suggest that university research be financed and directed primarily by provincial authorities.[78]

The provinces would retain the ability to affect competition in the forest sector incidentally by legislating for the management and sale of forest resources. An incursion into federal jurisdiction might well occur, however, should a provincial government attempt to control access to cutting rights on the basis of a company's market share or province of origin. The proposed constitution would guarantee the free interprovincial circulation of capital, as well as of goods and people.[79] It would appear, therefore, that provincial efforts specifically designed to thwart companies headquartered in other parts of Canada from acquiring cutting rights in a province would be *ultra vires*.

With respect to investment in Canada by foreign nationals, the Quebec Liberal Party proposes that: "Overall foreign investment policy would also be under the federal government's authority, subject to provincial jurisdiction over land-use planning, *natural resources*[80] and industrial development."[81] This arrangement would apparently allow the provinces to maintain barriers against foreigners seeking to acquire provincial resource companies or rights to provincial resources. What Ottawa's role would be with respect to foreign investment in Canadian natural resources is unclear from the statement quoted above, but it would appear to be weaker than it is at present.

Conclusions

This paper falls within that part of a national study of the effects of possible constitutional changes in Canada dealing with energy, natural resources, and environmental protection. The forestry resource was deliberately chosen for study on the basis of an opinion that it exemplifies a Canadian resource sector that is subject to highly decentralized management in a constitutional sense since provincial laws and administration serve a far more important function within the forestry-resource sector than do federal laws and administration.

This opinion is clearly substantiated by the existing pattern of forest management in Canada. What is more significant is that the effects that are seen to flow from any of the future constitutional options for Canada would not alter this provincial focus of management. The reasons for this conclusion are found in the intrinsic nature of the resource itself and emphasize again the truism that in a federation, legislative powers are usually divided so as to leave matters of mainly regional concern to regional Legislatures.

This provincial focus may appear to be disproportionately strong because this paper grew out of a case study that concentrated on the forest industry of British Columbia. The Rocky Mountains define a west coast region in the clearest geographical sense. Watershed effects of pulp and paper mills in British Columbia remain entirely within the region, and even acid rain falls west of the Great Divide. To use an economist's expression, there are few 'spillover effects' from forestry operations that require external regulation.

Even in the processing sector, the mountains and the distances from markets make the shipment of raw logs by road and rail impractical beyond British Columbia's borders. As far as lumber and other manufactured wood products are concerned, all regions of Canada, except the Prairie provinces, are essentially self-sufficient so that a federal presence is not required, as it is with oil and gas resources, to ensure supply to all parts of the country. On the contrary, the woods' industry produces products far in excess of Canadian demands. It might be thought that federal action would be necessary to ensure equitable access to export markets by competing producers from different forest regions of Canada. But even here a federal presence does not seem necessary because the producing forest companies have succeeded, by various means, in rationalizing their penetration of foreign markets in order to avoid harmful competition.

The remaining concerns about the forestry resource are constitutional elements that are generally recognized as appropriate for the national level of government. These are matters of mobility of labour and capital, and allocation of resource revenues between regional and national interests. A major concern at the present time is the need for a national forest policy, but its thrust is to ensure wood supplies for the future — a policy that calls for regional action. The call for federal action is mostly for increased federal spending on forestry research and management that will be carried out at the regional level and for national channels of communication to help co-ordinate regional forestry activities.

The exclusively regional nature of the forest resource suggests that it provides one instance where the pervasive problems of jurisdictional overlap and conflict will not plague the drafters of new constitutions. To a large extent this is a correct characterization, but in the significant area of environmental protection, we find a troublesome exception. This exception exists because, when the original framers of the Constitution allocated jurisdiction over coastal and inland fisheries to the Parliament of Canada, they departed from the truism that regional Legislatures ought to be given jurisdiction over regional matters. Since fish are widely recognized as the biological surrogate for measures of environmental quality in watersheds, federal control over fish places federal authorities in a position of direct conflict with provincial forest managers. After all, woods' operations and pulp and paper mills are the chief sources of water-quality degradation. Thus federal preoccupations go beyond regulating fish gear and catches to regulating fish habitats. Once that step is taken, there is obviously overlap with provincial management of the public lands and, particularly, with provincial management of the forests. Consequently British Columbia and, on the east coast of Canada, Newfoundland take the position that any revision of the Constitution should transfer federal fisheries' jurisdiction to the provinces concerned.

Such a solution of the problem of jurisdictional overlap is attractive for its simplicity and its consistency with the truism of regional control over regional matters. But the problem is deceptively complex. For example the salmon resource is an anadromous species that in major respects is a shared resource between Canada and the United States and, in the deep oceans, between those countries and other fishing nations. In other parts of Canada, the watersheds cross provincial boundaries, presenting the complex jurisdictional issues that are seen in the judgments of the Supreme Court of Canada in the *Interprovincial Co-operatives Ltd. Case*,[82] where Manitoba sought to obtain compensation for the loss suffered by its fishermen because of mercury poisoning originating in the Ontario portion of the shared watershed.

Moreover a constitution should be seen as more than a mechanism for allocating powers of government on principles of efficiency. Freedoms and values may be served by inefficient checks and balances. There are in British Columbia vigorous advocates of a continuing federal control over fisheries, who have no commercial interest in the fisheries whatsoever, but who see the need for a federal check on what might otherwise be a provincial forest policy that would ignore the environmental protection values for which the fish stand as surrogate. From this viewpoint inefficiency caused by overlapping management responsibilities and failure to realize optimum market values are necessary trade-offs for preserving other greater, though less quantifiable, environmental values.

This elaboration of the fishery-forestry conflict on the west coast is intended to make the point that in a federal state, jurisdictional overlap between levels of government and resulting conflict and inefficiency may be positive values in the ultimate balance of nationhood.

Our main conclusion is that the forestry resource is likely to remain almost entirely within the provincial sphere of jurisdiction under any new constitution. Finally, we offer specific elements of this conclusion in relation to specific constitutional options.

Advocates of full sovereignty(without association) for Quebec believe that co-operation for mutual benefit among the partners in Confederation is impossible to achieve. They seek to concentrate power in the Quebec government even if certain positive features of federalism must be given up. A sovereign Quebec could not utilize all the instrumentalities now available to the national government. Certain benefits would be lost completely. For example energy supplies from other provinces would be jeopardized, and protected Canadian markets for provincial products would be lost. Other powers would simply be weakened because of the smaller economic base that would result. Spending programs would be limited to provincial fiscal resources, whereas federal expenditures now draw upon the national tax base. Of course Quebec would probably gain increased efficiency from the elimination of bureaucratic overlap. The forest sector in a sovereign Quebec would not, in our assessment, be seriously affected; nor would the separation of Quebec adversely affect the forest sector in other parts of Canada.

The constitutional options of sovereignty-association and special status both seek to increase regional power and at the same time to retain the benefits of a national economy. Sovereignty-association would concentrate all public property, fiscal resources, and legislative jurisdiction within Quebec exclusively in the hands of the Quebec government. The 'treaty of association' established between the federal government and the Quebec government would give Quebec the benefit of a monetary and customs union with Canada and preferred use of national transportation facilities. Furthermore Quebec would participate as an equal with Ottawa in determining association-wide policies concerning tariffs, a central bank, and transportation.

Special status would keep Quebec within Confederation, but the province would acquire increased legislative jurisdiction and fiscal resources from Ottawa. The province would still continue to receive federal funds, but would be free from conditions governing their spending. Finally, Ottawa would be obliged to consult with Quebec in certain key areas of national policy.

Clearly both sovereignty-association and special status would provide maximum benefit to all sectors of the Quebec economy, including the forest industry. It is equally clear that constitutional arrangements that give one province substantial fiscal or economic powers and rights not made available to the other provinces would be unacceptable to the latter. On the other hand, if special status were limited to cultural and linguistic matters, it is likely that objections would be minor.

Renewed federalism would produce less drastic alterations in the distribution of powers. All provincial governments would benefit from some increases in legislative jurisdiction and fiscal resources. Still, the federal government would retain sufficient legislative and fiscal powers to make its presence strongly felt in national affairs. Just as important as changes in jurisdiction would be the establishment of new political institutions such as a reconstituted Senate, a constitutional court, or a revamped electoral system. All proposals for a renewed federalism would increase the avenues for consultation among governments at the policy-development stage. Furthermore they would require ratification of programs by provincial representatives in those cases where there are strong overlapping interests. Certainly the adoption of this option would benefit regional forest sectors, but not to the extent that Quebec would benefit from sovereignty-association or special status.

The forest sector in each province would not suffer particular hardship under any of these constitutional options. It might reach maximum effectiveness within a particular province enjoying sovereignty-association or special status, but that would be at the expense of the remaining provinces and consequently be politically unacceptable. What little disadvantage the forest sector suffers in each region by reason of divided provincial and federal jurisdictions under the present Constitution is not a reason to divide the country.

Notes

1. I. Place, "Forestry in Canada," *Journal of Forestry* 79 (September 1978): 557–62.

2. F.L.C. Reed and Associates, *Forest Management in Canada and Forest Sector Revenue* (1978), p. 36. (Hereinafter cited as *Forest Sector Revenue*.)

3. *Ibid*., p. 40.

4. *Ibid*., p. 41.

5. *Ibid*., p. 39.

6. *Readers Digest*, August 1979, p. 151.

7. *Forest Sector Revenue*, p. 38.

8. *Ibid*.

9. *Readers Digest*, p. 151.

10. F.L.C. Reed and Associates, Forest Management Institute, *Forest Management in Canada*, study prepared for the Canadian Forestry Service, Environment Canada (1978). (Hereinafter cited as *Forest Management*.)

11. *Ibid*., p. 122.

12. See generally G. Nagle, "What Is National Forest Policy in Canada?" *The Forestry Chronicle* 54 (December 1978), p. 291; G. Nagle, "A National Forest Policy for Canada?" *Journal of Forestry* 79 (November 1978), p. 718; Canadian Council of Resource and Environment Ministers, *Forestry Imperatives for Canada* (May 1979); *Forest Management*; *Forest Sector Revenue*.

13. *Ibid*.

14. F. Wetton, "Evolution of Forest Policies in Canada," *Journal of Forestry* 79 (September 1978), pp. 565–66.

15. British North America Act, 1867, 30 & 31 Vict. c. 3 (U.K.). (Hereafter cited only within the text.)

16. *Forest Sector Revenue*, p. 27.

17. *Ibid*.

18. *Ibid.*

19. *Ibid.*

20. Forest Act, R.S.B.C. 1979, c. 140, Part 12.

21. See *Smylie* v. *The Queen*, (1900) 27 O.A.R. 172.

22. See *Attorney-General of British Columbia* v. *MacDonald Murphy Lumber Co.*, (1930) 2 D.L.R. 721, (1930) A.C. 357 (P.C.), (1930) 1 W.W.R. 830; *Texada Mines Ltd.* v. *Attorney-General of British Columbia*, [1960] S.C.R. 713, (1960) 32 W.W.R. 37, (1960) 24 D.L.R. (2d) 81 (S.C.C.); *Canadian Industrial Gas and Oil Ltd.* v. *Government of Saskatchewan*, (1978) 80 D.L.R. (3d) p. 449 at p. 482 (S.C.C.)

23. *Canadian Industrial Gas and Oil* v. *Government of Saskatchewan*, note 22 above, pp. 484–89.

24. Export and Import Permits Act, R.S.C. 1970, c. E–17.

25. *Cf. Morgan* v. *Attorney-General for the Province of Prince Edward Island*, [1976] 2 S.C.R. 349.

26. British Columbia, Royal Commission on Forest Resources, *Timber Rights and Forest Policy in British Columbia*, 2 Vols. (Victoria: Queen's Printer, 1976). (Hereinafter cited as *Pearse Report*.)

27. *Forest Sector Revenue* and *Forest Management*.

28. M. Moore, "Fact and Fantasy in the Unity Debate," (December 1978), pp. 6–7.

29. It must be cautioned that it is only an assumption that policies authored by a regional government will be more sensitive or more beneficial to local needs. The very opposite might prove to be true. Be that as it may, this is an assumption that we have made in this paper.

30. Moore, "Fact and Fantasy . . .," pp. 6–7.

31. *Ibid.*, p. 20.

32. *Ibid.*

33. *Ibid.*, p. 30, note 15.

34. Québec, Conseil exécutif, *Québec-Canada: A New Deal* (Quebec: Éditeur officiel, 1979). (Hereinafter cited as *P.Q. Proposals, 1979*.)

35. *Ibid.*, p. 20.

36. *Ibid.*, pp. 47–65.

37. *Ibid.*, p. 59.

38. *Ibid.*, pp. 58–59.

39. *Ibid.*, p. 59.

40. *Ibid.*, p. 26.

41. Moore, "Fact and Fantasy . . .," p. 30, note 15.

42. *P.Q. Proposals, 1979*, p. 58.

43. A. Johnson, "The Dynamics of Federalism in Canada," *Canadian Journal of Political Science* 1 (1968), p. 27.

44. Government of British Columbia, "The Distribution of Legislative Powers," *British Columbia Constitutional Proposals*, Paper No. 8, September 1978, p. 21.

45. Johnson, "The Dynamics of Federalism in Canada," pp. 28–29.

46. *Ibid.*, pp. 30–31.

47. Canadian Bar Association, Committee on the Constitution, *Towards a New Canada* (Toronto, 1978). (Hereinafter cited as *C.B.A. Report, 1978*.)

48. Constitutional Committee of the Quebec Liberal Party, *A New Canadian Federation* (Montreal, 1980). (Hereinafter cited as *Ryan Proposals, 1980*.)

49. Task Force on Canadian Unity, *A Future Together* (Ottawa: Minister of Supply and Services Canada, 1979).

50. *Ryan Proposals, 1980*, pp. 91–92.

51. *Ibid.*, pp. 77–78, 86.

52. *C.B.A. Report, 1978*, pp. 75–77, 82.

53. *Ryan Proposals, 1980*, p. 92.

54. *Ibid.*, pp. 104–5.

55. *Ibid.*, p. 102.

56. *Ibid.*, p. 96.

57. That is, those species that ascend rivers to spawn. *C.B.A. Report, 1978*, p. 109.

58. *Ryan Proposals, 1980*, p. 97.

59. *Ibid.*, p. 116.

60. *Ibid.*

61. *Ibid.*, p. 110.

62. *Ibid.*

63. *Ibid.*, p. 111.

64. *C.B.A. Report, 1978*, p. 108.

65. *Ibid.*

66. *C.B.A. Report, 1978*, p. 108; *Ryan Proposals, 1980*, p. 102.

67. *Ryan Proposals, 1980*, p. 105.

68. *Ibid.*, p. 74.

69. *Ibid.*

70. *Ibid.*

71. *Ibid.*, p. 68.

72. *Ibid.*, pp. 51–52.

73. *Ibid.*, p. 68.

74. *Ibid.*, pp. 73–75.

75. Emphasis added.

76. *Ibid.*, p. 78.

77. *Ibid.*

78. *Ibid.*, pp. 77–78.

79. *Ibid.*, p. 105.

80. Emphasis added.

81. *Ibid.*, p. 102.

82. (1975), 53 D.L.R. (3d) 321 (S.C.C.)

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Les ressources naturelles dans une perspective de changement constitutionnel : le cas du Québec

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Les ressources naturelles dans une perspective de changement constitutionnel : le cas du Québec

Introduction

Nous présenterons dans les pages qui suivent quelques réflexions au sujet des conséquences de certains nouveaux modes de distribution du pouvoir politique sur le secteur des ressources naturelles, nous plaçant dans une perspective primordialement québécoise. Dès le départ, quelques précisions s'imposent.

Si le champ de la présente étude est vaste[1], il se trouve limité par le fait que l'accent sera mis sur une seule province, le Québec. On peut justifier de plusieurs façons cette limitation. Mis à part le fait que le Québec est véritablement à l'origine de la crise constitutionnelle canadienne, il a toujours défendu des positions très décentralisatrices à propos des ressources naturelles, alors même qu'il se trouve, comme on le verra plus loin, dans une position de dépendance accentuée pour plusieurs d'entre elles. Il y a là un étrange paradoxe qui mérite que l'on s'y attarde.

Nos conjectives seront fondées sur quatre options constitutionnelles : le fédéralisme renouvelé, le statut particulier, la souveraineté-association et l'indépendance pure et simple du Québec. Pour tenter d'apprécier, par exemple, l'impact d'un régime de souveraineté-association sur le secteur des ressources, il faut évidemment savoir de quelles ressources le Québec est doté ou dépourvu, quelles sont les ressources qu'il exporte ou importe et quels sont ses partenaires à l'échange. Cependant, les changements constitutionnels, qui s'opèrent habituellement lentement, prennent place à l'intérieur d'une certaine continuité historico-politique. On peut donc, en forçant à peine les choses, voir comme une donnée la position historique et politique du Québec en matière de ressources, aux fins d'une extrapolation sur les possibilités et les conséquences de certaines réformes constitutionnelles. Ainsi, dans un premier temps, nous examinerons les données historico-politiques et physico-économiques avant de passer aux extrapolations de la réforme constitutionnelle.

Les données politiques et économiques

Il est admis que les gouvernements canadiens, tant fédéral que provinciaux, ont à peu près tous adopté, et ce jusqu'à la fin des années 1950, une politique économique non interventionniste et de laisser-faire dans le domaine des mines et même dans l'ensemble du secteur des ressources naturelles[2]. Une situation économique générale de bas prix et de surplus prévalait alors dans ce secteur, ce qui amenait l'autorité publique à adopter une vision optimiste des « richesses » naturelles du Canada et à se comporter, non pas comme un agent de réglementation, mais comme un propriétaire soucieux de voir à l'exploitation de son domaine et d'en faciliter le développement au maximum. Pendant ce temps, il n'y a pas eu d'affrontements politiques et constitutionnels majeurs entre les deux niveaux de gouvernement[3], la constitution donnant le droit de propriété des terres et des ressources aux provinces[4], qui ont donc eu pendant longtemps le haut du pavé en cette matière.

Toutefois, il était à prévoir que, si les politiques gouvernementales passaient un jour de l'abstention à l'intervention et si le gouvernement fédéral, pour des motifs de rareté ou encore de surplus d'une ressource, commençait à régir les ressources naturelles, de sérieux conflits constitutionnels pourraient surgir. Juridiquement, il paraît clair que, grâce notamment à ses pouvoirs commerciaux et fiscaux[5], l'autorité fédérale peut avoir des coudées assez franches dans le contrôle des ressources. En revanche, les provinces, même si elles n'ont compétence que sur le commerce local[6], ont la propriété de celles-ci, et cela leur donne une espèce de légitimité historique et politique pour s'opposer aux interventions fédérales ou pour justifier les leurs. Comme l'écrit un auteur :

> *(...) crown ownership is available as an ideological weapon for use against the federal government, against the private sector, or against provincial governments whose political opponents perceive them as being too generous*

> *to the private sector. Almost any federal intervention in resource policy can be branded as an attempt to deprive the provinces of their property, while the mining firms and their numerous friends in provincial capitals can at times be placed on the defensive by appeals to protect the public domain against the encroachment of private greed. The Constitution and the political culture thus ensure that the Canadian version of the almost universal demand in recent years for community control over mineral resources is at least as likely to be 'economic provincialism' as 'economic nationalism'*[7].

Les ressources constituent depuis longtemps une espèce de symbole politique et constitutionnel pour les provinces. La position historique du Québec à ce sujet en est peut-être la meilleure illustration.

La position historique du Québec

Au cours des débats sur la confédération, en 1865, la question des ressources a été assez largement débattue; mais ceux qui en ont discuté l'ont fait évidemment dans une politique de propriétaire, mettant l'accent sur la compétence des provinces sur les terres publiques, la colonisation, les forêts et les redevances à tirer des concessions d'exploitation minière[8]. La question ne posait donc pas beaucoup de difficultés constitutionnelles.

Il en est allé ainsi pendant fort longtemps, au point que, même en 1956, le rapport de la Commission royale d'enquête sur les problèmes constitutionnels relevait comme seule difficulté majeure du secteur le fait que le gouvernement fédéral taxait de façon exagérée les revenus des compagnies exploitantes. Sur cela, la Commission insistait beaucoup[9]. À coup sûr, cette taxation était une question importante, et elle le demeure. Mais ce n'est là qu'une des questions importantes auxquelles on fait face aujourd'hui. De façon très typique, la Commission notait aussi que « le territoire et les ressources naturelles sont l'assise économique de l'autonomie provinciale, le gouvernement de la Province ayant l'initiative des moyens à prendre pour en assurer la conservation et l'exploitation rationnelle »[10].

Une politique gouvernementale peu interventionniste et surtout soucieuse de faciliter l'exploitation des ressources en consentant des avantages, fiscaux en particulier, aux entreprises était peu susceptible de provoquer des conflits entre gouvernements ni, évidemment, entre ceux-ci et les exploitants. C'était l'époque des « *good relations on all sides* »[11] et, si divergences il y avait, c'était au niveau de la concurrence fiscale. Or, le Québec a pratiqué pendant longtemps une politique d'incitation à l'exploitation, au point qu'on a pu soutenir que la résistance à l'industrialisation, qui a eu cours un long moment dans une certaine partie de l'opinion québécoise, ne s'est guère manifestée dans le domaine des ressources naturelles[12]. « Nous n'avons pas peur des capitaux étrangers (...). Je préfère importer des dollars américains plutôt que d'exporter des travailleurs canadiens », déclarait le premier ministre Taschereau en 1927[13]. Les mines, les forêts et les forces hydrauliques ont été au cœur du développement économique du Québec.

Cependant, le souci de favoriser l'exploitation des ressources ne s'est pas accompagné ou n'a pu s'accompagner d'un souci équivalent de favoriser une part de transformation sur place des produits. Certes ce phénomène n'est pas particulier au Québec et découle en grande partie de la spécialisation des économies. Il demeure que, dans le cas du Québec, l'impôt à l'exportation aurait été un moyen de favoriser une plus large transformation sur place. Mais, comme cet impôt est de compétence fédérale exclusive[14], on n'aurait pu y recourir qu'en endossant une intrusion fédérale dans le domaine des ressources. Cet argument semble avoir joué lorsque, au tournant du siècle, le Québec s'est refusé à envisager la possibilité d'un impôt à l'exportation sur le bois de pulpe[15].

À ce sujet, on rapporte qu'en 1910 le Québec, imitant en cela l'Ontario, a décrété un embargo sur le bois de pulpe coupé sur les terres de la Couronne et destiné à l'exportation vers les États-Unis dans le but de favoriser sa transformation sur place. Un an plus tard, les États-Unis abolissaient la douane sur l'importation du papier journal, ce qui a rendu possible l'implantation d'usines américaines de transformation au Québec[16]. Une telle action du Québec était sans doute irréprochable au point de vue constitutionnel. En effet, en période normale, même l'autorité fédérale ne peut forcer une province à exporter; au surplus, on reconnaît aux provinces une liberté de manœuvre sur les ressources des terres publiques qu'elles n'ont pas sur le commerce des produits du domaine privé[17]. Il est certain toutefois que le Québec ne pourrait taxer, par exemple, l'exportation d'amiante, à la fois parce qu'on est en présence de biens du domaine privé, et que cette mesure serait considérée comme une imposition indirecte et une réglementation commerciale, l'une et l'autre interdite aux provinces. À quoi l'on peut encore ajouter qu'à la différence du bois de pulpe, l'amiante est caractérisée par une structure de la demande qui rend difficile un traitement sur place du produit.

En résumé, le Québec, jusqu'à la fin des années 1950 à tout le moins, a mené une politique que la constitution non seulement ne gênait pas mais appuyait clairement, dans la mesure où elle consacrait le Québec comme le plein propriétaire des ressources, libre de les gérer à sa guise et de développer pour ce faire un tissu de liens commerciaux avec les capitaux étrangers, américains en particulier. Comme on l'a vu, les accrochages fédéraux-québécois étaient mineurs et surtout centrés sur la fiscalité des entreprises. Si le Québec a parfois constaté que la constitution le privait de certains pouvoirs, en particulier du contrôle des exportations, il a paru assez bien s'en accommoder.

Mais la situation a pris une nouvelle tournure depuis le début des années 1960. D'une part s'est posé le problème de la propriété et de la compétence législative sur les ressources au large des côtes, problème relativement bien identifié et qui a été l'occasion pour le Québec de réaffirmer avec beaucoup de vigueur son autorité en la matière. D'autre part s'est posé le problème plus diffus et plus complexe encore de la distribution des ressources entre les régions du pays et du rôle, actuel ou éventuel, du gouvernement fédéral comme arbitre de ces questions. On pense évidemment à la crise pétrolière de 1973 et à la politique fédérale qui en est découlée.

Examinons d'abord le problème des ressources au large des côtes, plus limité et mieux identifié au point de vue juridictionnel[18]. Quand le gouvernement fédéral a demandé l'avis de la Cour suprême sur la question de la propriété et du contrôle des ressources sous-marines au large des côtes de la Colombie-Britannique, le premier ministre du Québec a refusé de reconnaître la juridiction de la cour[19]. Une fois le jugement rendu en faveur de l'autorité fédérale[20], le premier ministre du Québec a refusé de considérer ce jugement applicable au Québec en invoquant le « principe fondamental » de « la propriété exclusive des provinces sur le domaine public et les ressources naturelles »[21]. On peut s'étonner de voir ainsi invoqué un principe constitutionnel à l'encontre d'un jugement qui visait précisément à interpréter la constitution. Mais cela montre bien que le principe a une importance politique telle que, si la constitution ou l'interprétation qu'on en donne viennent à lui porter atteinte, c'est la constitution qu'il faut changer ou la légitimité du tribunal qu'il faut mettre en question. C'est une position analogue qu'a adoptée la Saskatchewan ces dernières années. Deux jugements importants de la Cour suprême l'ayant privée de certains pouvoirs fiscaux et commerciaux sur ses ressources[22], les autorités provinciales ont aussi conclu qu'il fallait envisager de changer la constitution[23].

Voyons maintenant l'attitude du Québec face au rôle du gouvernement fédéral dans la répartition des ressources entre les régions.

Une des premières interventions fédérales significatives à ce chapitre fut l'élaboration et la mise en application de la politique nationale du pétrole entre 1958 et 1973. L'objectif bien connu de cette politique fédérale, qui a été à l'époque une politique de compromis, était de réserver au pétrole de l'Ouest canadien une part du marché du pays, celui à l'ouest de la vallée de l'Outaouais, tout en continuant de permettre à l'Est de s'approvisionner en pétrole étranger à des prix inférieurs, préservant ainsi pour les raffineurs montréalais le bénéfice des prix d'importation.

Ces dernières années, cette politique a été vivement critiquée par le Québec, tant sous le gouvernement Bourassa que sous le gouvernement Lévesque, et l'on a décrit ainsi les effets de la fameuse ligne Borden : stagnation des raffineries montréalaises pendant sept ans, expansion d'une zone de raffinage rivale sur l'axe Sarnia-Toronto, incitation aux compagnies internationales à s'établir à l'est du Québec pour s'éloigner de la fameuse ligne de partage[24].

Même si le Québec n'a pas participé aux travaux et aux audiences de la Commission Borden qui, de 1957 à 1959, avait élaboré cette politique, et même s'il ne semble pas avoir désapprouvé celle-ci à l'époque[25], il serait tout à fait erroné d'y voir l'acceptation d'une forme d'arbitrage par le gouvernement central. Lors de la conférence des premiers ministres, les 22 et 23 janvier 1974, le premier ministre du Québec rappelait la compétence exclusive des provinces sur les ressources naturelles, prônait une collaboration intergouvernementale dans l'établissement des programmes énergétiques et favorisait un rapprochement du prix du pétrole canadien du niveau international. Plus récemment, lors de la conférence des premiers ministres du 12 novembre 1979 sur la politique énergétique, le porte-parole du Québec déclarait : « Le Québec considère que les provinces ont un droit exclusif de propriété sur leurs ressources naturelles. Le Québec ne saurait donc approuver une décision unilatérale du gouvernement fédéral en matière de pétrole ». Il proposait alors une entente négociée sur le prix du pétrole, un rapprochement de celui-ci du prix international ainsi qu'un régime de prêts par les provinces productrices aux provinces consommatrices visant à ce que les premières participent au développement énergétique des secondes. Il s'opposait enfin fermement à l'établissement de taxes fédérales additionnelles sur la consommation d'essence, voyant ce geste comme « une ingérence additionnelle du gouvernement fédéral dans ce champ de taxation ».

Par ces positions, le Québec cherche surtout, outre un rapprochement avec les provinces productrices de pétrole et de gaz face à l'Ontario et à Ottawa, à rester maître du développement de ses propres ressources, hydroélectriques en particulier, et même de l'ensemble de son développement économique, quitte à sacrifier parfois une part de ses intérêts immédiats. En pratique, il lui est quasiment impossible de nier tout rôle au gouvernement fédéral dans la répartition des ressources entre les régions; dès lors sa position consiste plutôt à minimiser en quelque sorte ce rôle.

La rhétorique constitutionnelle constitue évidemment un des principaux instruments de cette politique, et le Québec n'est pas la seule province à y avoir recours. Certes, c'est une simplification d'invoquer l'autorité provinciale exclusive sur les ressources, alors que le gouvernement fédéral a compétence sur le commerce interprovincial et international, la taxation directe et indirecte, les gazoducs et les oléoducs, les coûts de transport, la localisation des ports, l'énergie nucléaire, et qu'il exerce déjà son contrôle sur les exportations d'électricité du Québec par l'intermédiaire de l'Office national de l'énergie. Mais, si ambigu soit-il, le principe de la propriété provinciale sur les ressources conserve beaucoup d'impact.

Pour le Québec, le principe de l'autorité exclusive des provinces sur leurs ressources a depuis toujours une importance telle qu'on peut dire qu'il est en quelque sorte au-dessus de la constitution. Mais les positions politiques et constitutionnelles sont une chose, les données physiques et économiques en sont une autre. Nous ferons donc un bref bilan des ressources du Québec et des principaux courants commerciaux dont celles-ci font l'objet.

Un bilan des ressources

Pour ce bilan, nous nous en sommes tenu à quelques observations générales, tout en prenant soin de renvoyer le lecteur aux études spécialisées les plus pertinentes[26]. Nous examinerons successivement la situation du Québec dans le secteur énergétique et dans les secteurs des mines et des forêts.

En matière énergétique, une donnée majeure est la complète dépendance du Québec dans le domaine des hydrocarbures (pétrole, gaz et charbon), aucun gisement important de combustibles fossiles n'ayant été découvert en sol québécois[27]. Le Québec, qui a commencé de s'approvisionner en pétrole de l'Ouest canadien au moment de la crise de l'énergie et grâce à l'oléoduc Sarnia-Montréal, devra sans doute revenir au pétrole d'outre-mer d'ici quelques années à cause de l'épuisement de nos réserves. En revanche, le gaz naturel en provenance de l'Ouest, qui a peu pénétré le marché québécois à ce jour, verra augmenter sa part dans la consommation globale jusque vers les années 1990, où il sera probablement remplacé graduellement par le gaz des îles Arctiques et par les ressources au large de la côte Atlantique[28].

Dans quelle mesure l'électricité, seule forme d'énergie primaire produite en abondance à des coûts inférieurs, peut-elle compenser la forte dépendance du Québec quant aux hydrocarbures? La position du Québec en la matière semble bonne, et, si le pourcentage de l'électricité dans la consommation énergétique globale croît comme prévu, la dépendance du Québec diminuera d'autant[29]. Notons aussi l'importance du bas coût de l'électricité pour les industries consommant beaucoup d'énergie (pâtes et papiers, première transformation des métaux, chimie, aluminium). On doit constater cependant que « il ne faut pas compter sur les exportations d'électricité pour équilibrer les comptes extérieurs du Québec dans le secteur de l'énergie »[30].

Au Canada, l'électricité est un secteur où des entreprises de grande taille se sont implantées dans un cadre essentiellement provincial et l'autorité fédérale n'a pas eu à intervenir, sauf quant au contrôle qu'elle exerce présentement sur les exportations à l'étranger et sur l'établissement des réseaux à cette fin. Vu la faiblesse relative des échanges interprovinciaux d'électricité[31], il se peut que les contrôles fédéraux ne s'accroissent pas beaucoup. Comme on l'a signalé précédemment, on peut prévoir aussi que l'électricité, combinée au développement de certaines énergies nouvelles, permettra au Québec de diminuer sa dépendance du pétrole, à la fois canadien et étranger, produit sur lequel l'autorité centrale a des pouvoirs importants[32]. On peut prévoir en revanche une dépendance accrue du Québec envers le gaz canadien qui, comme le pétrole, fait l'objet d'une réglementation fédérale[33]. Quant à la fission nucléaire, sur laquelle Ottawa a aussi des pouvoirs importants, le Québec ne prévoit pas pour l'instant la nécessité de développements majeurs.

Passons maintenant aux secteurs des mines et des forêts.

Le secteur minier, où la présence fédérale est assez minime, ne compte que pour 2 à 3 % du produit intérieur brut québécois. Ce secteur est à la baisse, et la main-d'œuvre n'y représente que 1 % de la population active. Le secteur n'est pourtant pas négligeable, étant essentiel à certaines régions dont il constitue la seule base d'industrialisation. Par ailleurs, le minerai brut, concentré et semi-transformé, comptait en 1975 pour 37,6 % des exportations totales du Québec. Dans l'ensemble de la production primaire québécoise, le secteur minier est le plus important (43,7 %), en avance sur les forêts, l'agriculture et les pêcheries. Comme il est lui-même en amont de la métallurgie et de la sidérurgie, il « pourrait fort bien devenir la clef d'un développement économique plus poussé. En ce sens, il serait peut-être opportun de le situer au moins près du cœur de ce que pourrait être l'économie québécoise »[34].

Dans le cas des minéraux, « la presque totalité de la production est exportée; cependant, sauf pour l'amiante, les montants en cause ne sont pas très élevés. En revanche, pour le minerai de fer, il y a là une exportation importante du Québec, mais sa place parmi les producteurs mondiaux reste fort modeste »[35].

L'industrie minière québécoise est donc importante; mais peu de ses produits ont un intérêt stratégique évident. Elle est primordialement dirigée vers l'exportation internationale, qui n'est pas diversifiée puisqu'elle est tournée en grande partie vers les États-Unis. Ce qui frappe surtout, c'est la faible transformation sur place des minerais, phénomène qui tient à plusieurs facteurs, parmi lesquels nous retrouvons l'étroitesse du marché ainsi que le très grand contrôle étranger et l'intégration verticale des entreprises, les filiales se chargeant d'approvisionner les maisons-mères américaines en matières premières[36].

Quelques mots enfin sur l'industrie forestière, qui se classe première parmi les industries manufacturières du Québec quant au nombre de travailleurs et aux salaires versés, et deuxième quant à la valeur ajoutée et la valeur des expéditions. Le Québec est premier producteur canadien de papier journal (46 %), de pâte de bois (33 %) et d'autres papiers (38 %), mais il ne produit que 15 % du bois d'œuvre et moins de 10 % du contreplaqué. Cependant, la part du Québec est en régression, même pour les secteurs forts, à cause surtout de la concurrence de la Colombie-Britannique[37]. Les États-Unis étant ici encore le principal partenaire commercial du Québec, ce secteur est donc extrêmement vulnérable à la conjoncture américaine, et le déplacement de l'activité économique du nord-est vers le sud-ouest américain pourrait contribuer à limiter la croissance des exportations québécoises.

Notons enfin que la structure tarifaire canado-américaine importe beaucoup, mais que les possibilités d'améliorer la position du Québec sont très limitées. Une hausse des tarifs, comme on l'a parfois demandée aux États-Unis, serait néfaste à l'ensemble de la production forestière canadienne, alors qu'une baisse générale favoriserait les produits finis américains et au mieux d'autres provinces avant le Québec. De même dans le secteur minier, comme nous l'avons déjà montré, une baisse des tarifs favoriserait peu l'industrie primaire du Québec, vu la faible élasticité d'offre des produits miniers non transformés et la lenteur d'ajustement de la production, et elle aurait un plus grand impact sur l'industrie manufacturière ontarienne[38].

Gardant à l'esprit les données qui précèdent, tentons maintenant de faire quelques conjectures sur la politique québécoise des ressources.

Des conjectures sur le changement constitutionnel et la politique des ressources

Le fédéralisme renouvelé

Même si les pouvoirs fédéraux en matière de ressources naturelles sont plus considérables qu'on ne le croit souvent, certains prétendent que la compétence d'Ottawa est insuffisante et qu'elle devrait être accrue[39]. Toutefois, il nous semble que, dans le contexte politique actuel, toute réforme constitutionnelle envisageable irait dans le sens non pas nécessairement d'une diminution marquée des pouvoirs fédéraux mais, à coup sûr, d'une certaine augmentation des pouvoirs des provinces. Le thème du contrôle provincial des ressources est en effet si fort, au Québec et ailleurs, qu'une centralisation accrue paraît nettement improbable[40]. Du reste, certaines propositions de réforme avancées à ce jour confirment cette tendance.

L'idée serait en particulier de faire en sorte que les provinces puissent gérer et mettre en marché leurs ressources plus librement qu'aujourd'hui. Un avant-projet constitutionnel d'origine fédérale, discuté lors de la rencontre fédérale-provinciale des premiers ministres tenue à Ottawa les 5 et 6 février 1979, fournit un exemple intéressant de cette orientation[41]. On y reconnaît une compétence provinciale exclusive sur l'exploitation, la mise en valeur, la conservation et la gestion des ressources, de même que sur leur exportation et leur taxation, à la condition toutefois que la taxe soit applicable à tous les produits primaires, qu'ils soient exportés ou pas. L'avant-projet maintient la compétence fédérale sur le commerce interprovincial et international d'exportation. L'exportation des ressources naturelles et des produits primaires qui en sont issus relève donc de compétence partagée. L'avant-projet fédéral prévoit même qu'en cas de conflit, ce serait les mesures provinciales qui l'emporteraient, sauf en cas de « nécessité d'envergure nationale qui ne représente pas un ensemble d'intérêts locaux » ou dans le domaine du commerce international.

Comme il fallait s'y attendre, certaines provinces en réclament beaucoup plus et, même si de telles revendications proviennent vraisemblablement davantage des provinces de l'Ouest que du Québec, ce dernier y souscrit sans réserve. Dans un document de travail de la réunion des premiers ministres provinciaux tenue à Toronto les 1^er^ et 2 octobre 1976 — document élaboré après de longues consultations entre les provinces —, on prévoyait une compétence provinciale exclusive sur les « terres, mines et minéraux » et sur toute taxation des ressources naturelles, ajoutant que les taxes payées aux provinces devaient être déductibles des revenus des entreprises aux fins de l'application des lois fiscales fédérales. On excluait l'application du pouvoir déclaratoire fédéral aux ressources, et les compétences fédérales, en particulier celle sur le commerce, ne pouvaient être exercées que « sous réserve » de la compétence provinciale sur les ressources et non plus « nonobstant » cette dernière. Le document optait enfin pour un contrôle provincial sur les ressources au large des côtes, l'avant-projet fédéral de février 1979 prônant pour sa part une forme de compétence conjointe ou concurrente.

C'est une proposition semblable qu'a présentée le Québec lors de la négociation constitutionnelle de l'été 1980. Cette proposition prévoit une prépondérance provinciale sur le commerce interprovincial et exclut l'application aux ressources du pouvoir déclaratoire et, dans une certaine mesure, du pouvoir fédéral sur les entreprises et les ouvrages interprovinciaux. Le Québec favorise en matière de ressources les ententes réciproques entre les provinces, et il est clair qu'il veut ainsi se garantir la plus complète autonomie sur ses ressources hydroélectriques.

Toutes ces propositions présentent certaines difficultés juridiques d'ordre technique qu'il n'est pas de notre propos d'analyser ici. Il convient plutôt d'en faire ressortir les conséquences politiques et économiques éventuelles. Il est assez difficile d'admettre, en régime fédéral, un pouvoir provincial prépondérant sur tout commerce interprovincial de ressources naturelles. À ce titre, l'avant-projet fédéral pourrait constituer une solution de compromis, si ce n'était de la difficulté de définir ce qu'est une « nécessité d'envergure nationale ». Comme, en pareil cas, l'avant-projet laisse intacts les pouvoirs fédéraux, les risques de politiques économiques provinciales hautement restrictives ne seraient pas très grands, encore que, pour contrer l'action d'une province, le parlement fédéral devrait légiférer; à l'heure actuelle, l'effet de dissuasion est obtenu par la menace d'un simple recours aux tribunaux, sans parler évidemment des contraintes économiques. On peut soutenir que, en cas de stricte nécessité, un contrôle politique, exercé par le pouvoir fédéral, serait préférable à un contrôle judiciaire, qui se prête souvent assez mal à l'appréciation des politiques commerciales et qui peut être déclenché à n'importe quel moment par un individu ou une entreprise[42]. On s'est beaucoup plaint dans le passé de l'impossibilité pour les provinces d'agir sur leur commerce d'exportation. Ce changement pourrait améliorer les choses. Il ne réglerait cependant pas tout, et, dans la mesure où l'impôt provincial à l'exportation continuerait d'être prohibé, il ne mettrait pas nécessairement fin aux étatisations provinciales que l'on opère dans le but de maîtriser plus aisément le commerce extérieur de certaines entreprises.

Si cette tendance se concrétise, le phénomène des négociations interprovinciales s'intensifiera, ne serait-ce qu'entre les provinces de l'Est, qui devront s'entendre sur un partage du territoire sous-marin. De plus en plus de décisions économiques à impact extraprovincial seront prises en fonction des intérêts de la province concernée, ce qui ne peut qu'entraîner des tensions. Le débat sur les ressources se politisera, éventuellement région contre région, et l'autorité fédérale jouera davantage un rôle d'arbitre que celui d'initiateur.

Le statut particulier

Le régime de statut particulier est caractérisé, à l'intérieur d'un régime fédéral, par l'introduction d'un élément d'asymétrie dans les rapports fédéraux-provinciaux, le titulaire de la compétence sur certaines matières étant d'une part le gouvernement fédéral pour la majorité des provinces et d'autre part la ou les provinces qui jouissent d'un statut particulier[43]. En d'autres termes, les provinces, dans un tel régime, n'auraient pas toutes les mêmes pouvoirs; une ou plusieurs d'entre elles exerceraient certaines compétences qui, pour les autres, appartiendraient à l'autorité fédérale.

Les auteurs canadiens ont surtout mis l'accent sur les difficultés que ce système pourrait engendrer quant à la représentation des provinces ayant un statut particulier au sein des institutions fédérales[44]. On semble s'être assez peu intérrogé, cependant, sur le genre de compétence pouvant se prêter à un régime de statut particulier. À cet égard, on peut soutenir que la compétence sur les ressources naturelles serait peut-être une de celles qui, en contexte canadien, se prêterait le moins à une pareille différence de statut entre les provinces.

Pour qu'un régime de statut particulier soit applicable, il faut que le secteur visé soit suffisamment centralisé pour qu'une décentralisation un tant soit peu significative puisse être opérée au profit de certaines provinces. Bien entendu, on peut atteindre le même résultat si une majorité de provinces délègue au pouvoir central certains pouvoirs, d'autres ne le faisant pas et se retrouvant de ce fait dans une situation de statut particulier. Le secteur des ressources naturelles au Canada est décentralisé à tel point qu'on ne voit pas aisément ce que l'on pourrait donner en plus; on ne voit pas aisément non plus ce qu'une majorité des provinces pourrait consentir à déléguer à l'autorité fédérale. Certes, il n'est pas du tout impensable que les pouvoirs provinciaux sur les ressources soient augmentés, et une révision de la constitution, si elle était opérée, irait vraisemblablement dans ce sens. Il nous semble toutefois qu'à cause de leur nature même, les pouvoirs provinciaux qui pourraient être ainsi accrus pourraient difficilement l'être au bénéfice d'une ou de quelques provinces.

Toutes les provinces ont des ressources, complémentaires ou concurrentes, et on conçoit que le rôle du pouvoir central est, dans une certaine mesure, d'arbitrer leurs désaccords. Il est dès lors difficile d'imaginer qu'une ou plusieurs provinces conservent sur ces ressources des pouvoirs qui seraient exercés par l'autorité fédérale, cette dernière agissant alors à la fois comme arbitre et comme défenseur des provinces sans statut particulier. Il est naturel que les provinces tiennent toutes à peu près au même point à leurs ressources. Cela milite en faveur de l'uniformité de leur statut constitutionnel dans ce secteur[45].

Notons qu'une reconnaissance de la compétence et de la propriété des provinces sur les ressources au large des côtes conduirait à une espèce de statut particulier *de facto*, les provinces non côtières se trouvant complètement privées des bénéfices de ces ressources. Toutefois, dans l'optique de plusieurs provinces, il s'agirait non pas d'un statut particulier mais au contraire d'une mesure d'uniformité, les ressources au large des côtes devant, comme les autres, relever des pouvoirs provinciaux.

L'indépendance du Québec

Dans la rhétorique politique, qu'elle soit favorable ou défavorable à l'indépendance, les ressources naturelles constituent une arme importante, bien qu'à double tranchant. Le Québec est tour à tour présenté comme riche et important exportateur, ou démuni et dépendant du pétrole et du gaz de l'Ouest, qui lui viennent à prix favorable et dont l'acheminement est favorisé par la politique fédérale du transport. Tout compte fait, la sécurité d'approvisionnement en pétrole et en gaz canadiens est probablement de nature à renforcer l'attachement au régime fédéral, d'autant que ce régime n'a pas à ce jour entraîné une régie fédérale importante sur l'électricité, laissant au Québec une grande autonomie sur cette importante ressource. La question énergétique ne paraît donc pas être un atout pour la thèse de l'indépendance. Cela dit, nous tenterons quand même d'apprécier les conséquences de l'indépendance sur la politique des ressources.

Dans le domaine énergétique, il paraît clair que la dépendance du Québec sur l'importation demeurera considérable. Les conséquences de la souveraineté sur le niveau des prix sont cependant difficiles à apprécier. Elles pourraient être assez peu marquées si les prix de l'énergie canadienne atteignaient le niveau des prix internationaux. Le Québec n'y perdrait donc pas en retournant au pétrole importé, auquel il devra de toute façon retourner d'ici quelques années. Par ailleurs, le fait de s'approvisionner à titre d'État indépendant ne devrait pas non plus le défavoriser, puisque la demande canadienne d'énergie internationale ne paraît pas suffisante pour avoir une influence sur l'offre. En revanche, les importations d'énergie par le Québec auraient probablement un impact considérable sur la valeur de la devise québécoise ainsi que sur l'implantation d'industries secondaires utilisant du matériel importé. On a déjà mentionné que les exportations d'électricité québécoise aux États-Unis ne compenseraient certainement pas le déficit des comptes extérieurs pour les importations pétrolières et gazières. Il va sans dire que les conséquences de l'option souveraineté dépendraient beaucoup de la façon dont le Québec pourrait réduire ses importations et éventuellement exploiter de nouvelles découvertes[46].

Au chapitre des mines et de l'industrie forestière, il s'agit avant tout de savoir dans quelle mesure l'indépendance pourrait améliorer l'exportation. Rappelons qu'au Québec, le tiers des exportations consistent en des matières brutes alors qu'en Ontario ce chiffre baisse à moins de 10 %. Elles sont peu diversifiées, les plus importantes étant le papier, le minerai, l'amiante, le cuivre et l'aluminium, et les principaux clients se chiffrent au nombre de huit ou neuf. Comme ce secteur en général s'est assez mal comporté ces dernières années et comme les exportations les plus dynamiques (automobiles, énergie) n'ont pas profité au Québec, on peut songer à blâmer la politique commerciale et tarifaire fédérale. Mais on a vu précédemment les effets limités de la politique tarifaire sur le commerce des matières premières. Certes, le Québec, s'il avait sa propre monnaie, pourrait stimuler son commerce d'exportation en recourant à la dévaluation. On a déjà noté, cependant, que l'élasticité de l'offre est faible dans le cas des matières premières et que ces dernières occupent une part importante dans les livraisons du Québec à l'étranger. Comme les importations canadiennes sont très diversifiées et que le Canada importe plusieurs produits de base, il est dans une mauvaise situation pour participer à la cartélisation de certains de ses produits. Peut-être un Québec indépendant serait-il mieux placé pour le faire[47] et pourrait-il négocier des accords sectoriels avec les États-Unis dans ses domaines forts, par exemple l'aluminium ou le zinc, bien que, de facon générale, la perspective d'accords sectoriels dans le domaine industriel ne paraît pas très bonne aux experts[48] et que l'approche sectorielle canadienne à la Ronde Tokyo n'ait pas eu beaucoup de succès dans le domaine minéral.

L'indépendance permettrait-elle au Québec de réaliser une politique des ressources plus cohérente et plus efficace, et de parvenir à hausser la productivité et à abaisser les coûts? Bien sûr le Québec récupérerait tout son territoire et tous ses impôts, sa fiscalité serait uniforme, et il ne serait pas nécessaire d'entreprendre de nouveau cette concertation pour une « politique minérale nationale » qui n'a pas eu de suite au cours des années 1970. Les chevauchements de programmes disparaîtraient aussi, même si une étude de la question a montré que, dans le domaine des ressources, ils avaient été relativement peu nombreux par rapport à l'ensemble des missions de l'État[49]. Dans tout ce tableau, il semble toutefois que la question la plus importante et la plus problématique demeure celle des approvisionnements en énergie à l'étranger.

La souveraineté-association

Il est évidemment très difficile de faire des conjectures sur ce que contiendrait un traité d'association Canada-Québec sur la politique des ressources de chacun des partenaires. Une union monétaire réduirait l'effet néfaste des importations du Québec sur son économie, et il est vraisemblable que le Québec souhaiterait un accès privilégié aux sources d'énergie canadienne et une certaine sécurité d'approvisionnement. À propos des livraisons du Québec dans le reste du Canada, on a vu que les exportations québécoises de ressources sont surtout dirigées vers l'étranger, et il y a peu de raisons pour que cet état de choses se modifie considérablement. Au reste, dans la plus importante étude réalisée à ce jour sur la souveraineté-association[50], les auteurs ont mis l'accent surtout sur les échanges de produits manufacturés, soutenant que ce secteur est plus sujet aux changements pouvant résulter des modifications aux rapports commerciaux canadiens.

Il s'agit donc de savoir ce que le Québec pourrait offrir en échange d'un certain accès privilégié aux ressources canadiennes. À cet égard, il semble que le Québec pourrait tirer profit à la fois de sa position géographique et de l'importance économique de son marché pour le pétrole et le gaz canadiens. Il serait en effet essentiel pour le reste du Canada d'avoir un droit de passage sur le territoire québécois, pour les besoins du commerce international en général et pour les communications entre les deux parties du territoire canadien. On sait aussi que le marché du gaz, peu développé à ce jour, est en expansion au Québec, qui pourrait offrir ainsi un débouché intéressant pour le gaz albertain et pour les réserves des îles Arctiques.

On peut donc penser qu'il est fort probable qu'un traité d'association Canada-Québec ne serait pas silencieux sur la question des ressources énergétiques.

Conclusion

Concluons simplement en rappelant le caractère bien particulier, au point de vue politique et constitutionnel, de la question des ressources au Canada, et la position paradoxale de certains gouvernements. C'est le cas du Québec, qui a continué de maintenir une position très autonomiste, alors que les changements majeurs intervenus ces dernières années dans le secteur énergétique ont accentué sa dépendance d'autres régions du pays et auraient pu le rendre plus sympathique aux politiques fédérales. Mais c'est aussi le cas jusqu'à un certain point du gouvernement fédéral. Alors même que ce dernier met de plus en plus l'accent sur la liberté des échanges à travers le pays et dénonce les mesures provinciales qui y font obstacle, il est peut-être prêt à concéder aux provinces, dans le secteur des ressources, des pouvoirs qui ne seraient assurément pas toujours exercés dans le sens de cette liberté.

Notes

1. Les ressources naturelles se divisent en ressources renouvelables ou non énergétiques (eau, forêts, pêcheries, hydroélectricité) et en ressources non renouvelables ou énergétiques (pétrole, gaz, charbon, mines).

2. Voir notamment Donald J. Patton, « The Evolution of Canadian Federal Mineral Policies » et Gérard Gaudet, « Forces Underlying the Evolution of Natural Resource Policies in Quebec », dans *Natural Resources in U.S.–Canadian Relations*, vol. 1, *The Evolution of Policies and Issues*, Carl E. Beigie et Alfred O. Hero, Jr., éd., Boulder, Colorado, Westview Press pour le compte de C.D. Howe Research Institute et de la World Peace Foundation, 1980, pp. 203–247 et 247–265.

3. On parle ici d'affrontements politiques et constitutionnels de grande intensité et non pas de simples conflits judiciaires qui eux ont été nombreux entre les deux ordres de gouvernement dans le domaine des ressources. Pour une analyse proprement juridique, voir l'ouvrage de Gérard V. La Forest, *Natural Resources and Public Property Under the Canadian Constitution*, Toronto, University of Toronto Press, 1969.

4. Article 109 de l'A.A.N.B. 1867.

5. Le Parlement a compétence sur le commerce interprovincial et international et sur tout mode de taxation [art. 91(2) et (3) de l'A.A.N.B. 1867]. Sont aussi pertinents le pouvoir fédéral sur les entreprises et les ouvrages interprovinciaux et internationaux [art. 92(10)(a)], le fameux pouvoir déclaratoire fédéral [art. 92(10)(c)] et même le pouvoir général du Parlement de légiférer pour « la paix, l'ordre et le bon gouvernement » du pays (art. 91, paragraphe introductif), ce dernier ne paraissant toutefois pouvoir justifier, selon la jurisprudence récente, des interventions fédérales dans des champs provinciaux qu'en contexte d'urgence.

6. Article 92 (16) de l'A.A.N.B. 1867.

7. Garth Stevenson, « The Process of Making Mineral Resource Policy in Canada », dans *Natural Resources in U.S.–Canadian Relations*, vol. 1, *The Evolution of Policies and Issues*, Carl E. Beigie et Alfred O. Hero, Jr., éd., Boulder, Colorado, Westview Press pour le compte de C.D. Howe Research Institute et de la World Peace Foundation, 1980, p. 170.

8. *Débats parlementaires sur la question de la confédération des provinces de l'Amérique britannique du Nord*, Québec, Hunter, Rose et Lemieux, 1865, notamment dans les interventions de l'honorable James Skead (p. 247, sur les forêts), de l'honorable Hector Louis Langevin (p. 379, sur la colonisation) et de Christopher Dunkin (pp. 520 et 1026, sur les revenus miniers). Les interventions sur le principe de la propriété provinciale des terres de la Couronne ont été multiples.

9. Québec, Commission royale d'enquête sur les problèmes constitutionnels, *Rapport*, Montréal, Province de Québec, 1956, vol. 3, t. 1, p. 372; et vol. 1, pp. 25, 41, 258–261, 283.

10. *Ibid.*, vol. 3, t. 1, p. 365. On y insiste sur l'électricité, les forêts et les mines comme piliers du développement économique du Québec (pp. 331 sqq.).

11. Wendy MacDonald, *Constitutional Change and the Mineral Industry in Canada*, Kingston, Ont., Institute for Intergovernmental Relations: Centre for Resource Studies, Queen's University, 1980, p. 21.

12. Gaudet, « Forces Underlying the Evolution . . . », p. 250.

13. *Ibid.*

14. Articles 91(3) et 122 de l'A.A.N.B. 1867.

15. Gaudet, «Forces Underlying the Evolution . . . », p. 260.

16. *Ibid.*, p. 259, pour le récit de ce conflit.

17. Il faut comparer, à ce sujet, *Smylie* c. *La Reine* (1900) 27 O.A.R. 172 (C.A. Ont.) et *Attorney-General for British-Columbia* c. *McDonald Murphy Lumber Company, Limited* (1930) A.C. 357; 2 Olmsted 659. Dans le premier cas, une province a pu interdire l'exportation hors du pays de bois coupé sur les terres publiques mais non ouvré dans la province. Dans le second cas, on a jugé invalide tout bois non ouvré dans la province en question. Quant au Québec, voir la *Loi sur l'utilisation des ressources forestières*, L.R.Q. 1977, chap. U–2, art. 2; et la *Loi sur l'exportation d'énergie électrique*, L.R.Q. 1977, chap. E–23, art. 1.

18. La revendication la plus ferme du Québec en matière de ressources au large des côtes a trait au golfe Saint-Laurent. Le Québec a toujours soutenu que le golfe était partie intégrante de son territoire, selon un partage avec les provinces de l'Atlantique basé sur les lignes équidistantes des rives. N'excluant pas complètement un arbitrage fédéral pour le partage territorial entre les provinces concernées, le Quebec privilégie toutefois des ententes entre celles-ci. Le problème des ressources s'insère donc dans le thème politique plus vaste de l'intégrité du territoire; du reste, la Commission d'étude sur l'intégrité du territoire, mise sur pied en 1967 par le gouvernement du Québec, a approuvé la position du gouvernement au sujet du golfe dans son rapport (vol. 7.1, *La frontière dans le Golfe du Saint-Laurent, le rapport des commissaires*, Québec, Éditeur officiel, 1972). La question des frontières septentrionales est d'une autre nature, puisque ce qu'on a déjà envisagé à ce sujet était une extension des frontières provinciales dans la baie James, la baie d'Hudson et le détroit d'Hudson, et non pas la revendication par le Québec de territoires lui appartenant. Sur cette question et sur le récit des pourparlers entre le gouvernement fédéral et le Québec, l'Ontario et le Manitoba, voir notamment la Commission d'étude sur l'intégrité du territoire, vol. 5.1, *Les frontières septentrionales, le rapport des commissaires*, Québec, Éditeur officiel, 1971.

19. Déclaration du premier ministre Jean Lesage à la conférence fédérale-provinciale du 19 juillet 1965 tenue à Ottawa. Sur la position du Québec, voir

Québec, ministère des Affaires intergouvernementales, *Les positions traditionnelles du Québec sur le partage des pouvoirs, 1900–1976*, Québec, M.A.I., 1978, pp. 35–38.

20. *Reference Re: Offshore Mineral Rights of British Columbia*, (1967) R.C.S. 792.

21. Lettre du premier ministre Jean-Jacques Bertrand au premier ministre Pierre Elliott Trudeau, le 5 février 1969.

22. *Central Canada Potash Co. Limited et al.* c. *Le gouvernement de la Saskatchewan*, (1979) 1 R.C.S. 42, où fut jugé invalide un plan provincial de commercialisation de la potasse parce qu'il était applicable à des produits exportés; *Canadian Industrial Gas & Oil Ltd.* c. *Le Gouvernement de la Saskatchewan et al.*, (1978) 2 R.C.S. 545, où fut jugé invalide un impôt provincial sur le revenu minier, au motif qu'il s'agissait à la fois d'un impôt indirect et d'une simple réglementation interdite du commerce.

23. Les déclarations du premier ministre Blakeney sont reproduites dans MacDonald, *Constitutional Change* . . ., pp. 38–39.

24. J. Gilles Massé, *Les objectifs d'une politique québécoise de l'énergie*, Québec, Éditeur officiel du Québec, 1972, pp. 98–101; M. Massé était le ministre responsable des questions d'énergie dans le gouvernement Bourassa. Des critiques non moins sévères ont été formulées sous le gouvernement Lévesque. Voir, par exemple, Québec, Développement économique, *Bâtir le Québec : énoncé de bolitique économique, synthèse, orientations et actions*, Québec, Éditeur officiel du Québec, 1979, p. 25.

25. Ce n'est en pratique qu'en 1970, lors de la célèbre affaire *Caloil*, qu'il l'a remise en question. Voir *Caloil Inc.* c. *Le Procureur général du Canada*, (1971) R.C.S. 543, où fut jugé valide un règlement de l'Office national de l'énergie interdisant de transporter de l'essence à moteur importée à l'ouest d'une ligne divisant la province de l'Ontario.

26. Nous empruntons beaucoup à l'étude de Pierre-Paul Proulx, Louise Dulude et Yves Rabeau, *Étude des relations commerciales Québec–USA, Québec-Canada : options et impacts, contraintes et potentiels*, préparée pour le compte du ministère des Affaires intergouvernementales du Québec, Québec, Éditeur officiel du Québec, 1979, pp. 430–585. Cette étude contient une bibliographie de taille aux pp. 460 (énergie), 535 (mines) et 585 (forêts). Nous empruntons aussi à l'important rapport de Bernard Bonin et Mario Polèse, avec la collaboration de Jean-K. Samson, *À propos de l'association économique Canada–Québec*, Québec, ENAP, 1980. Il s'agit assurément de l'étude la plus sérieuse à ce jour des possibilités d'une telle association économique.

27. Il existe cependant un certain potentiel de pétrole et de gaz dans le sous-sol québécois. Voir, par exemple, Québec, Direction générale de l'énergie, *La politique québécoise de l'énergie : assurer l'avenir*, Québec, Éditeur officiel du Québec, 1978, p. 56. Quant au charbon, d'un intérêt marginal pour la province, le Québec l'importe en sa totalité, en très grande partie en provenance des États-Unis, tout comme l'Ontario. Les coûts de transport rendent prohibitif l'approvisionnement en charbon canadien.

28. Même s'il ne faut pas minimiser les difficultés de substitution du gaz au pétrole, le Québec espère doubler d'ici 1990 le taux de consommation du gaz par rapport à la consommation totale d'énergie et le voir passer de 6 à 12 %. Entre 1971 et 1976, la consommation de gaz s'est accrue de 59 %.

29. L'électricité compte pour 22 % dans le bilan actuel de la consommation énergétique de la province, et la prévision gouvernementale, que d'aucuns jugent trop optimiste, est à l'effet que ce taux sera de 41 % en 1990. On prévoit aussi que la puissance installée de Hydro-Québec doublera ou presque de 1977 à 1985, et on estime qu'une fois complétés les travaux du complexe La Grande, environ 40 % du potentiel hydraulique rentable restera encore non aménagé.

On retrouve ces prévisions et ces estimations dans Québec, Direction générale de l'énergie, *La politique québécoise*. . . .

30. Proulx, Dulude et Rabeau, *Étude des relations commerciales* . . . , p. 459. Ces auteurs rapportent que les achats québécois d'hydrocarbures au prix mondial auraient été de 2,4 $ milliards en 1976, soit 28 % des importations totales (ce montant a plus que doublé depuis lors), alors que les ventes d'électricité à la Power Authority de l'état de New York (PASNY) entre 1977 et 1981 sont de 123 $ millions (234 $ millions en 1979). Les importations de Churchill Falls sont considérables (28 % de la puissance de Hydro-Québec en 1977, 15 % en 1985, 11 % en 1990) et plus importantes que les exportations vers l'état de New York, le prix de vente dans ce dernier cas étant cependant beaucoup plus élevé. Comme les marchés de l'électricité des diverses provinces canadiennes ne sont pas complémentaires, à cause de la concordance des variations saisonnières, les échanges portent sur les ajustements et les surplus : il n'y a pas de vente d'énergie dite « ferme », et l'on estime que les réseaux d'interconnexion entre le Québec et les provinces voisines sont suffisants et satisfaisants. Les échanges avec les États-Unis sont plus importants, vu la différence de climat et l'absence de barrière tarifaire sur l'électricité. Voir en particulier l'analyse de Jean-Charles de Groote, « Note sur la collaboration en matière d'énergie électrique », dans *Le Québec et ses partenaires économiques canadiens : perspectives d'avenir*, textes préparatoires du Congrès de l'Association des économistes québécois (avril 1979), rassemblés par Michel Boisvert *et al.*, Montréal, Les Éditions Quinze, 1979, pp. 115–133.

31. Voir la note 30.

32. Le gouvernement du Québec s'est fixé un objectif de réduction de 20 % de la demande de pétrole brut entre 1975 et 1980. Voir Québec, Direction générale de l'énergie, *La politique québécoise* . . . , p. 66.

33. Voir les conclusions en ce sens de l'étude de Jean-A. Guérin, « Les échanges énergétiques du Québec avec ses partenaires économiques canadiens », dans *Le Québec et ses partenaires économiques canadiens : perspectives d'avenir*, textes préparatoires du Congrès de l'Association des économistes québécois (avril 1979), rassemblés par Michel Boisvert *et al.*, Montréal, Les Éditions Quinze, 1979, pp. 93–113.

34. Proulx, Dulude et Rabeau, *Étude des relations commerciales* . . . , p. 465.

35. Bonin et Polèse, *À propos de l'association économique* . . . , p. 65. Trente-cinq pour cent de la production québécoise d'amiante, soit près de 40 % de la production mondiale, est exportée aux États-Unis, de même que 60 % de la production du fer et de l'acier, soit 40 % des importations américaines. On peut observer une dépendance réciproque semblable pour l'aluminium. Représentant 70,6 % des exportations canadiennes en 1975 — le Canada vient en tête des exportateurs mondiaux — 65,5 % de l'aluminium québécois est exporté aux États-Unis, soit 51,4 % des importations américaines. Sur l'ensemble des produits minéraux exportés du Québec, 38,9 % (en 1973), 53,1 % (en 1974) et 47,3 % (en 1975) l'étaient aux États-Unis. Notons que les réserves québécoises d'amiante et de fer sont considérables; il en va différemment du nickel, du zinc et du cuivre, une dizaine de mines de cuivre ayant fermé leurs portes depuis quelques années. Malgré le manque de bauxite et la multiplication des producteurs, il semble que le Québec, qui dispose d'électricité à bon prix, peut être optimiste au sujet de sa production d'aluminium.

36. C'est ainsi, par exemple, qu'en 1975 le Québec expédiait, en minerais et concentrés, 79,3 % de son fer. Notons cependant que les possibilités de transformation sur place de l'amiante sont plus limitées qu'on ne le croit généralement et qu'il en va de même pour l'aluminium, les frais de transport appelant une transformation proche des points de consommation.

37. « La tendance est à la diminution de l'importance relative de ces activités primaires dans le produit intérieur brut que ce soit pour l'agriculture, les forêts, la pêche et les mines et carrières. Par rapport à l'ensemble du Canada, l'importance relative du Québec a baissé pour l'agriculture et les mines, et plus récemment pour l'industrie forestière également » (Bonin et Polèse, *À propos de l'association économique* . . . , p. 30). Le bas prix de l'énergie compense toutefois pour les coûts de transport dus à l'éloignement des sites.

38. Voir Proulx, Dulude et Rabeau, *Étude des relations commerciales* . . . , pp. 512–513, où les auteurs s'appuient sur une étude de Roma Dauphin, « Les effets des variations du taux de change sur les exportations du Québec », étude effectuée pour le ministère québécois de l'Industrie et du Commerce, Québec, MIC, 1978.

39. Voir, par exemple, Ian McDougall, « L'énergie et l'avenir du fédéralisme : harmonie nationale ou hégémonie continentale? », dans R.B. Byers et Robert W. Reford, *Le défi canadien : la viabilité de la Confédération*, Toronto, Institut canadien des affaires internationales, 1979, pp. 339–371. L'auteur favorise une forte régie fédérale du secteur énergétique.

40. Peu après la décision de la Cour suprême dans *Central Canada Potash Co. Limited et al.* c. *Le gouvernement de la Saskatchewan*, (1979) 1 R.C.S. 42, le premier ministre Blakeney écrivait à son homologue fédéral pour protester contre cette décision. Il observait notamment : « Je dois (...) vous avouer honnêtement que le temps est venu pour votre gouvernement de répondre aux aspirations légitimes des provinces de l'Ouest. En continuant de négliger l'Ouest, vous mettrez en péril l'existence même de notre pays » (lettre du 10 octobre 1978).

41. Voir aussi Canada, La Commission de l'unité canadienne, *Se retrouver : observations et recommandations*, Ottawa, ministre des Approvisionnements et Services Canada, 1979, p. 98. Le rapport du Comité sur la constitution de l'Association du Barreau canadien (*Vers un Canada nouveau*, Montréal, Fondation du Barreau canadien, 1978, p. 118) suggérait d'autoriser les provinces à restreindre l'exportation de produits, à exiger leur transformation sur place et à établir des programmes de contingentement et de stabilisation des prix sur les produits d'exportation. Sur ce point, les propositions constitutionnelles du parti libéral du Québec sont plus évasives. On se contente de souhaiter que les pouvoirs fédéraux sur le commerce ne nuisent pas aux attributions provinciales sur les ressources, et l'on souhaite aussi des actions fédérales concertées avec les provinces. Voir *Une nouvelle fédération canadienne*, document de la Commission constitutionnelle du parti libéral du Québec, Montréal, parti libéral du Québec, 1980, p. 100.

42. Pour une critique en ce sens, voir Paul C. Weiler, « The Supreme Court of Canada and Canadian Federalism », dans *Law and Social Change*, Jacob Ziegel, éd., Toronto, Osgoode Hall Law School/York University, 1973, p. 39.

43. Logiquement, on peut dire que le concept de statut particulier vise aussi la situation d'une ou de plusieurs provinces ayant non pas plus mais moins de pouvoirs que la majorité. Si, par exemple, trois provinces déléguaient à Ottawa leur compétence sur les relations de travail, elles auraient un statut particulier par rapport aux sept autres. En pratique, toutefois, on emploie surtout l'expression *statut particulier* pour désigner un statut de plus grande décentralisation.

44. Voir, par exemple, Pierre Elliott Trudeau, *Le fédéralisme et la société canadienne française*, Montréal, Éditions HMH, 1967, pp. *xi* et 37; et André Dufour, « Le statut particulier », *La revue du Barreau canadien*, vol. 45 (1967), p. 451. D'autres ont approuvé ou critiqué ce système pour des motifs plus généraux. Voir, par exemple, Jacques Brossard, « Fédéralisme et statut particulier », dans *Problèmes de droit contemporain. Mélanges Louis Baudouin*, Adrian Popovici, éd., Montréal, Les presses de l'université de Montréal, 1974,

p. 425; et A.W. Johnson, « The Dynamics of Federalism in Canada », *Revue canadienne de science politique*, 1 (1968), p. 26.

45. Le professeur Smiley a déjà fait remarquer qu'il y a une grande différence dans le mode de déroulement d'une négociation fédérale-provinciale selon le secteur ou le domaine sur lequel elle porte. On ne négocie pas de la même façon, ajoutait-il, selon qu'il s'agit de se partager quelque chose — un champ fiscal ou des subsides — ou d'harmoniser ses interventions ou sa réglementation, par exemple sur l'énergie, l'environnement, la protection du consommateur ou le transport. Voir Donald V. Smiley, *Canada in Question: Federalism in the Seventies*, 2e éd., Montréal, McGraw Hill, 1976, p. 64. De façon analogue, on peut avancer qu'il y a des secteurs qui se prêtent mal ou peu à certains modèles de partage des responsabilités politiques.

46. Sur divers points, voir l'étude de R.J. Rahn, « L'énergie et l'indépendance du Québec », dans *Économie et indépendance*, textes du congrès de l'Association des économistes québécois (avril 1977), colligés et présentes par Luc-Normand Tellier, Montréal, Les Éditions Quinze, 1977. Notons que le programme de souveraineté-association du gouvernement du Québec (*La nouvelle entente Québec-Canada*, Québec, Éditeur officiel du Québec, 1979) met l'accent sur les ressources naturelles du Québec, en particulier sur l'hydroélectricité (pp. 95–96) et dénonce violemment l'« intrusion extrêmement dangereuse » (p. 22) d'Ottawa dans le domaine des ressources. Le volet *association* contient cependant peu de choses précises sur les ressources.

47. Cette idée est évoquée dans l'étude de Proulx, Dulude et Rabeau, *Étude des relations commerciales* . . . , pp. 532–634.

48. Bonin et Polese, *À propos de l'association économique* . . . , pp. 344–345.

49. On renvoie ici à l'étude de Germain Julien et Marcel Proulx, sous la direction de Arthur Tremblay, *Le chevauchement des programmes fédéraux et québécois*, Québec, École nationale d'administration publique, 1978. Sur l'ensemble des problèmes juridiques reliés à l'indépendance, voir Jacques Brossard, *L'accession à la souveraineté et le cas du Québec : conditions et modalités politico-juridiques*, Montréal, Les presses de l'université de Montréal, 1976. Sur la question territoriale en particulier, l'auteur est d'avis que le Québec indépendant aurait droit aux frontières maritimes dont bénéficient les États souverains en droit international (p. 501), mais qu'il lui serait difficile de réclamer un partage de l'Arctique suivant la théorie dite des secteurs (p. 504).

50. Bonin et Polèse, *À propos de l'association économique*. . . .

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Environmental Protection and Enhancement under a New Canadian Constitution

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Environmental Protection and Enhancement under a New Canadian Constitution

Introduction

The purpose of this paper is to consider appropriate arrangements of constitutional powers as they apply to environmental management in each of four conceivable constitutional futures for Canada:

- A renewed federalism of a type generally similar to that which now prevails
- A new federalism in which there would be room for special status for one or more provinces on certain significant matters
- A situation in which Quebec would be fully independent, with the remaining provinces federally united
- A situation of 'sovereignty-association' between Quebec and a federally united Canada.

The term 'environment' will be used in a somewhat restricted sense throughout this paper to denote an amenity — a more or less healthful and enjoyable living space for humans and other vital creatures — rather than a source of wealth. This is not to ignore the fact that the environment is also the source of all material wealth. Indeed it is the exploitation of this wealth that poses the principal threat to the quality of the living space. By defining 'environment' as 'an amenity', I am merely trying to isolate the 'quality-control' aspect of the problem for special consideration.

The virtue of special consideration may not be immediately evident. Under the existing Canadian Constitution, although certain elements of the environment are accorded specific attention — "fisheries,"[1] "public lands,"[2] "lands, mines, minerals, and royalties,"[3] for example — governmental jurisdiction over the protection and enhancement of environmental quality is not mentioned expressly; it adheres instead to a number of other federal and provincial powers.[4] Since this arrangement has produced what some observers, at least, regard as a generally satisfactory distribution of environmental jurisdiction,[5] one may ask why it would be desirable to list environmental quality control separately in any new constitution. While it would be premature to attempt an answer to that key question at this stage of the paper, it will be assumed for the purpose of the following discussion that 'environmental protection and enhancement' will be a discrete head of governmental jurisdiction under any new constitutional arrangement. After examining the ramifications of such an approach, we shall be in a better position to discuss its advisability.

We shall further assume that the municipal level of government is subsumed by the provincial order. Operationally this assumption is naïve. There are many environmental problems that lend themselves more readily to municipal than to province-wide solutions. Nevertheless, no new constitution that may be made for Canada in the foreseeable future is likely to experiment with tripartite federalism; constitutional powers will continue to be divided dichotomously. It is possible that once the fundamental federal-provincial division of powers has been agreed on, there may be a further provincial-municipal allocation, based either on provincial constitutions or on purely political considerations, but this paper will not address that stage of the problem. Thus any reference to matters suitable for provincial jurisdiction should be understood to include those for which municipal responsibility might be appropriate.

It is somewhat surprising, given the importance of the subject and the energy that has been expended in recent years on studies of constitutional reform, that relatively little attention has been paid to future constitutional arrangements for environmental management. A selection of proposals that have been made is set out in an appendix to this paper.[6]

Although the aim of the paper is to present an objective discussion, it will not be possible to avoid stating personal opinions. So many possibilities are involved that unless some are eliminated by the expression of preferences from time to time, conclusions will be unattainable.

Factors Involved

The most difficult aspect of any attempt to fashion suitable constitutional arrangements for the future is to decide on the criteria of suitability. A number of factors come to mind that might be relevant to the design of constitutional provisions concerning the environment. When examined more closely, some of these factors prove to be of great importance, while others are of little or no significance. This section of the paper will attempt to examine several arguably relevant factors: control techniques, environmental sectors, and territory affected.

Control Techniques

The war against environmental degradation must obviously be waged on many fronts, and to be effective the government or governments concerned must employ a wide range of legal weaponry. Among the more important of these weapons are the following:

- General criminal law (criminal nuisance,[7] and so on)
- Special legislated prohibitions (such as the pollution prohibitions in the federal Fisheries Act,[8] or municipal anti-noise by-laws)
- General schemes to monitor and regulate environmental quality (federal Clean Air Act[9] and Canada Water Act,[10] provincial clean environment legislation, and so on)
- Licensing controls (fishing and hunting quotas, automobile-licensing standards, and so on)
- Zoning
- Private law (the torts of private and public nuisance, for example)
- Positive programs (such as the creation of recreational facilities and the preservation of wilderness enclaves).

It might appear at first glance that it would be possible, when planning for a new constitution, to determine which ones of these control techniques would be more suitable for the central government and which for the provincial governments, and then to distribute constitutional jurisdiction accordingly. Regrettably this is not so. Every government, federal or provincial, that is involved in environmental regulation must be able to employ all, or almost all, these tactics. At present both orders of government can employ all but two of them: general criminal law is the exclusive domain of the Parliament of Canada,[11] and most of the private law field is reserved for the provincial Legislatures.[12] These exceptions are not as important as they might seem since the provinces have the power to enforce their laws by means of prohibitions with penal consequences,[13] and the federal Parliament may create private law remedies if they are necessarily incidental to some legitimate head of federal jurisdiction.[14] In short, in terms of control technique, there is very extensive overlap of federal and provincial powers under the existing Constitution. That is as it should continue to be in the future; satisfactory environmental protection and enhancement require that within their respective spheres of responsibility, all governments should have fully equipped tactical arsenals available.

Control tactics do not, therefore, provide useful criteria for determining an appropriate future allocation of constitutional powers.

Environmental Sectors

Discussions of environmental issues are often organized according to the sector of the environment affected: air, water, or land. It is tempting to speculate that a similar division of governmental responsibilities for the environment might be appropriate, but it requires only brief reflection to conclude that it would not. For one thing, two or more of these sectors are often attacked by a single source of contamination. Air pollution from factory chimneys can produce acid rain which, in turn, poisons the land and water on which it falls. Fertilizers and pesticides spread or sprayed on farm lands can be carried into waterways by spring run-off. Underground storage or disposal of toxic chemicals can endanger ground water. And so on. Division of jurisdiction on the basis of whether air, water, or land is affected would result in needless duplication of control machinery.

Another reason that governmental powers cannot usefully be distributed according to the sector of the environment affected is that in each sector federal control would seem appropriate in some situations and provincial control in others. While the problem of preventing noxious odours from feed lots or garbage dumps from interfering with the enjoyment of neighbouring domestic property is clearly local in nature, it is just as clear that the federal government has a legitimate role to play, at least in large-scale air pollution that creates a risk of international contamination. Although there is no doubt that the water quality of intraprovincial lakes and streams should generally be a provincial responsibility, other governments ought to be involved in the case of interprovincial and international waterways. Even in the case of land, an extraprovincial dimension exists wherever there is a significant threat of contamination to surface or ground water that might eventually flow across provincial boundaries.

The last few examples suggest a criterion that might be at least partially useful in distributing constitutional powers: territoriality. This criterion will be examined next.

Territory Affected

It makes much sense in a federal system to base at least prima facie constitutional jurisdiction over any subject on its territorial ramifications. Federalism is, after all, a system of government that strives to place issues of purely local import within local control and issues with wider impact under central control. By this standard the provinces would be given jurisdiction over environmental matters contained entirely within provincial bounds, and matters having wider impact would be at least partially under federal control. (It is assumed that the airspace above each province is provincial territory, at least in its lower reaches; if it should ever be decided that the airspace is federal territory,[15] and if that decision should be perpetuated in the new constitution, the implications of the territorial principle would be markedly different.) The application of this principle would not be without problems, however. Some of these would indicate that only a modified form of territoriality would be desirable.

In the first place, the federal principle itself is not wholly territorial. The central government has, and will continue to have, control over many enterprises that operate within the territorial limits of the various provinces. Federally owned or regulated transportation and communication systems, for example, though usually connected to facilities outside a given province, have permanent intraprovincial establishments and operations that often have significant environmental impact. Federal Indian reserves and national parks are located in the provinces. Although the notion of federal 'enclaves' immune from provincial laws has been rejected by the Supreme Court of Canada,[16] federally owned and regulated enterprises must be permitted to operate within the provinces, primarily in accordance with federal directives, if federal jurisdiction is to mean anything. This implies that some environmental problems, even though contained entirely within the geographic bounds of a single province, must be regarded as having an extraprovincial dimension merely because of the involvement of a federally owned or regulated enterprise; and these problems must thus be subject to less than exclusive provincial jurisdiction. On the other hand, to exempt such federal operations completely from the burden of provincial environmental laws would grievously impair the ability of the provinces to protect their own environments. I have argued on other occasions that federal enterprises have been accorded excessive immunity under the existing Constitution.[17] An effective arrangement for the future must include some satisfactory compromise between completely territorial jurisdiction and complete immunity of federal enterprises from provincial laws. We shall return to this problem later in the paper.[18]

The special position of national parks and federally supervised historic sites within the provinces should perhaps be commented on at this point. A purist might argue that there would be no justification for such properties in a federal system that assigned responsibilities for environmental protection and enhancement on a territorial basis. In the case of national historic sites, the argument clearly has little merit. Every Canadian, regardless of residence, can justifiably expect the national government to ensure the preservation of, and accessibility to, such unique and nationally significant places. The validity of federal government involvement with recreation areas and wilderness preserves is less obvious, but no less real or important. It is in the interest of all Canadians that representative samples of our natural heritage be preserved in all parts of the country as living museums accessible to both Canadians and foreign visitors: Quebecers have as legitimate an interest in the Rocky Mountains as Albertans have in the Plains of Abraham.

While it is true that the provinces could perform this function (and do so to a considerable degree), only the Government of Canada could guarantee its being carried out to uniformly high standards and to an extent that includes examples of all the country's major natural features. Moreover the present existence and successful administration of national parks over a long period of time, in itself argues for their continuance; constitutions cannot ignore history. Provincial laws, environmental and otherwise, should, however, be applicable within the parks, subject to the paramountcy provisions to be discussed later.[19]

Another difficulty inherent in the territorial principle is the identification of extraprovincial concerns. Where pollution actually crosses provincial borders, it is obvious that the situation has an extraprovincial dimension, but it is not nearly so clear which elements of the problem would therefore fall under federal jurisdiction. Would federal jurisdiction apply to every aspect of the polluting activity? Or to those aspects with respect to which the province would be powerless to act unilaterally because of the territorial limitations on its powers? Or only to those aspects with which the province is unable to deal unilaterally and has so far failed to deal with through co-operation with other affected jurisdictions?

It is submitted that the approach most closely consonant with the principles of federalism would be the last mentioned: that is, the restriction of federal involvement in trans-boundary situations to jurisdiction over those aspects of the problem with which the provinces cannot cope unilaterally and have not dealt co-operatively.[20] This involvement could be accomplished by employing the currently unfashionable notion of federal responsibility for problems having a 'national dimension'.[21] A matter would be considered to have a 'national dimension' only to the extent that it would be beyond the power of the provinces to deal with it. Suppose, for example, that smoke from a factory in British Columbia created air pollution in the State of Washington. The Parliament of Canada would have prima facie jurisdiction under its 'national dimension' power[22] to regulate that factory's activities to the extent necessary to reduce or prevent the trans-boundary contamination since the avoidance of breaches of international law and other international controversies is a matter of national interest. However, if the province reached accord with American authorities on appropriate control measures such as permissible pollution levels and so on, there would no longer be a problem with a national dimension that justified federal legislation. The matter might not end there, of course; if Parliament then decided that it would be in the national interest to 'trade off' a solution to the British Columbia–Washington situation for a reduction of American pollution of Lake Erie or of air pollution from Detroit and Chicago, another national dimension would appear, and federal legislation sufficient to implement such an international bargain would be in order.

If the territorial principle were applied in an entirely unqualified manner, yet another difficulty could arise. To give the provincial governments (or the Government of Canada, in the case of the Territories) complete autonomy with respect to the protection of their own internal environments might, in some circumstances, diminish the likelihood that the protection afforded would be adequate. The risk would be particularly acute in situations where the exploitation of a resource would benefit a large majority of the population living a long way from the area where the resulting environmental damage would occur. The Churchill River diversion project in northern Manitoba offers a good illustration. Manitoba Hydro, a provincial Crown corporation, decided that rather than develop hydro-electric generating facilities on the Churchill River, it would be much more economical to divert water from the Churchill to the Nelson River, where it could be run through existing and projected generators. The scheme involved widespread environmental damage both because the lower Churchill would be deprived of its natural flows, and because massive flooding of lakes, streams, and forests would take place along the diversion route. Since the area was remote, the individuals and communities adversely affected were relatively few, and the project would be economically advantageous for the majority of Manitobans in the south of the province, the provincial government raised no serious opposition. It was only after the federal government intervened, claiming jurisdiction by virtue of its powers over navigation, fisheries, and so on, that some ameliorative measures were taken, and even they are regarded as inadequate by many critics.

This is not to suggest that provincial governments are inherently less likely to be sensitive to environmental concerns than the Government of Canada. The point is that as a rule, any government having general responsibility for an area is influenced more by the wishes of the majority of its constituents than by those of minorities. Since the territorial principle would place primary environmental responsibility on provincial shoulders, this rule, as it relates to the environmental sphere, would apply chiefly to provincial governments. It would, however, be equally applicable — perhaps more so — to the Government of Canada's responsibility for the northern Territories.

To provide satisfactory protection against environmental degradation, this tendency should be counteracted. Two possible methods for achieving this suggest themselves: a counterpoise of related powers by the order of government that does not have territorial jurisdiction, as it partly has now, and an overriding constitutional guarantee of certain environmental rights. Both possibilities will be explored further in the next section.

General Constitutional Characteristics

Foremost among the factors that must be taken into account in deciding on suitable treatment of environmental matters in a new constitution are the general characteristics of that constitution itself. It has already been observed that since any new arrangement is likely to involve some form of federalism, the distribution of governmental powers should, to the extent permitted by other constitutional imperatives, be directed to achieve the federal ideal of having local matters dealt with locally and national matters centrally. In a later section of this paper, consideration will be given to alterations to this scheme that may be called for in the event that the future constitution permits special status for one or more provinces, or in the event that Quebec becomes independent or stands in a relationship of sovereignty-association with the rest of Canada. In this section, the discussion will concern several other important features of the general constitution that could influence the selection of appropriate provisions with respect to the environment.

Entrenchment of Environmental Rights

No constitution serves only a single purpose or seeks to uphold only a single value. While the British North America (BNA) Act recites a desire of Canadians to be "federally united,"[23] and generally achieves that goal, the federalist ideal has been deliberately compromised in certain respects in the interests of other goals regarded as more important than the attainment of perfect federalism. To cite only two examples that still command wide support, section 93 significantly qualifies provincial autonomy in the field of education in order to guarantee certain rights to denominational schools, and section 133 limits the ability of Quebec to determine the language to be used in its legislature and courts. The BNA Act, 1971 and the new Canadian Charter of Rights and Freedoms places like limits on the powers of the Manitoba and New Brunswick Legislatures. It is probable that any new Canadian constitution would similarly deviate from pristine federalism by placing certain highly cherished values beyond the reach of otherwise autonomous Legislatures. It would be possible to include within this group of constitutionally entrenched rights some that would protect against the type of environmental dangers illustrated by the Churchill River diversion.

What environmental rights would be appropriate for constitutional entrenchment? One writer, who called for an "Environmental Bill of Rights," proposed that it include the following guarantees:

1. Public hearings when maximum effluent levels are being set.
2. A requirement for environmental impact statements to be filed by any private person or government agency undertaking projects likely to affect significantly the environment, well in advance of start-up, outlining possible environmental changes and alternatives. These statements would be linked with public hearing procedures where there is opposition to the project.
3. Concrete guidelines from the Legislature against which environmental agency action (or lack thereof) can be reviewed by an environmental ombudsman and the courts, and drastic restriction on environmental agency discretion.
4. Guaranteed access by the public to governmental information and expertise, removal of the civil service secrecy oath, and the provision for financial support to assist those persons appearing in the public interest before environmental tribunals.
5. An environmental ombudsman, whether one person or an environmental council, to advise on policy, demand review of Environment Ministry decisions, report periodically on the state of the provincial environment, and act as a watchdog on environmental abuse.
6. Procedural Law Reforms would also be assured.

a) Any citizen would be allowed to sue
   i) in the civil courts in regard to a public nuisance; and
   ii) to obtain an injunction to stop any project or environmental proceeding not conducted according to law.

b) The threat of having to pay costs when a person is suing for public nuisance or law enforcement would be removed, except where the suit is completely frivolous.

c) The requirement that the plaintiff give an undertaking to pay damages to obtain a temporary injunction would be eliminated, or the amount limited to a sum which the ordinary citizen can afford, such as $500.

d) If a plaintiff or prosecutor shows, in a suit or private prosecution, that there are probable grounds to support his case, the burden of proof would shift to the defendant or accused. That is, it would be up to the defendant to show that the contaminant or other harmful activity was not the result of his actions.

. . .

e) All environmental laws would be amended so that once the plaintiff or prosecutor has demonstrated that environmental harm has occurred or is likely to occur, the defendant or accused should prevail only if he proves that there is "no feasible alternative to [his] conduct and that such conduct is consistent with the promotion of the public health, safety, and welfare . . .[24]

Others have compiled roughly similar lists.[25] It should be obvious that although these items may all be appropriate for inclusion in the environmental protection legislation enacted by particular jurisdictions, most of them would not be suitable for constitutional entrenchment. At this level of administrative detail, the legislators should be free to experiment with various techniques. Some of the items would lend themselves to constitutional guarantee, however. Access to public information and standing to challenge unconstitutional, or otherwise illegal, public actions in the courts are, for example, rights that many believe should be guaranteed to every citizen. Of course the importance of such rights is not restricted to the field of environmental protection; if included in a future constitution, they would merit general applicability. The most specific form of entrenchment relating to the environment that might realistically be expected in a new constitution would be a vague and sweeping statement akin to constitutional declarations of freedom of speech or rights of privacy: that every citizen has the right to enjoy a reasonable standard of purity in the natural environment. The drafting of such a guarantee would be a difficult task, and its judicial interpretation would be even more challenging. Nevertheless, in view of the fact that American courts have relatively successfully translated highly generalized constitutional guarantees of civil liberties into precise judicial remedies, and that the Canadian Constitution now contains a wide range of entrenched rights and freedoms, neither task would appear to be beyond the capacities of Canadian lawyers and judges.

The probability that environmental rights would be entrenched in a new Canadian constitution is not very high, however. The proposal for an "Environmental Bill of Rights" and other suggestions for the guarantee of citizens' rights mentioned above were all advanced as models for ordinary legislation, not as constitutional imperatives binding on the Legislatures themselves. The writer favours the entrenchment approach, and it can be expected to appeal to other idealists and environmental enthusiasts, but it would be surprising if so novel a notion were to command majority support. Entrenchment of more general procedural rights, such as freedom of public information and standing to sue for unconstitutional conduct, would be a realistic expectation, however. The essential point to appreciate is that the fewer environmental guarantees, specific or general, substantive or procedural, that the constitution contains, the more important it will be to avoid unilateral governmental powers and to counterbalance the environmental responsibilities of the two orders of government. Some implications of such counterbalancing will be considered next.

Jurisdiction Overlap

A new constitution's tolerance for overlap between the two orders of government is an important component in the task of allocating environmental responsibility between them. Reference has already been made to its effect on the protection of rights. Another important implication is that if federal and provincial powers can be exercised concurrently, there is less need to be concerned about their precise definition than there would be if they involved exclusive jurisdiction.

The present Constitution permits a high degree of overlap, both generally and with respect to environmental matters. This concurrency takes two different forms, but it is submitted that for practical purposes they amount to the same thing. The only concurrency formally recognized by the BNA Act relates to immigration and agriculture[26] and to old age pensions.[27] However, many other fields of constitutional jurisdiction also involve considerable overlap of a type often referred to as 'functional concurrency'. Functional concurrency flows from a judicial recognition that a single subject matter of legislation can have both federal and provincial aspects. A law prohibiting the pollution of lakes and streams could be passed by a provincial Legislature on the basis of provincial responsibility for "the management . . . of public lands,"[28] while an identical law could be enacted by the Parliament of Canada pursuant to its jurisdiction over "fisheries"[29] or "criminal law."[30] With one exception,[31] any conflicts between the provisions of federal and provincial legislation in situations of either formal or functional concurrency are presently resolved by according paramountcy to the federal provision.

Concurrency is not complete, of course. Despite the extensive overlap between federal and provincial powers in the environmental area, some gaps exist. The decision of the Supreme Court of Canada in the *Interprovincial Cooperatives* case[32] is illustrative. That case concerned the power of the Manitoba Legislature to enact laws with respect to pollution of Manitoba waters by extraprovincial sources. A majority of the Court held that the enactment was invalid, despite the absence of contradictory federal legislation. The reasons were divided. Three of the majority judges held that legislation seeking to deal with interprovincial pollution could only be enacted by the Parliament of Canada.[33] The other majority judge and the three dissenters were of the view that such legislation could be passed provincially, but they differed on whether the transmitting or receiving province could do so.[34] All the judges ignored or rejected the solution that functional concurrency seemed to dictate: that although the federal Parliament might have pre-emptive jurisdiction, in the absence of contradictory federal legislation both provinces had the power to make laws effective within their own territories concerning aspects of the problem occurring within them. The failure of the Court to endorse functional concurrency in this instance left an unfortunate lacuna in Canada's environmental protection armour.

It was, apparently, to seal such gaps that the Joint Parliamentary Committee on the Constitution of Canada recommended in its 1972 *Report* that a new constitution acknowledge formal concurrency with respect to air and water pollution:

> 100. Control over the pollution of air and water should be a matter of concurrent jurisdiction between the Provincial Legislatures and the Federal Parliament, and, as in section 95 of the British North America Act, the powers of the Federal Parliament should be paramount.
> 101. The concurrency of jurisdiction over air and water pollution would necessitate both Federal-Provincial and Province-to-Province planning and coordination of programs.[35]

This suggestion has been opposed on the ground that the existing distribution of powers in the environmental field is satisfactory, and the introduction of formal concurrency would be undesirable: "Ce rapport sérieux et intéressant contient plusieurs recommandations qui emportent notre adhésion. Cependant au chapitre de la pollution nous écartons l'idée d'une compétence commune. Car il faudrait alors stipuler une prépondérance en cas de conflit; et, cette prépondérance dans une matière aussi diffuse et tentaculaire risque de détruire le jeu normal des articles 91 et 92 et de porter une atteinte très sérieuse à la dimension fédérale de la Constitution. Il vaut beaucoup mieux que les deux ordres de pouvoirs publics légifèrent en la matière en se repliant sur les compétences que la Constitution leur a reconnues."[36] The fear that the proposal would result in some aggrandizement of federal powers is well founded. Formal concurrency with respect to 'pollution' would permit federal authorities to move into some areas, such as purely local waste disposal, for which there is no existing excuse for federal involvement, and federal paramountcy would allow provincial and municipal legislation on the subject to be pushed aside. Two qualifying observations should be made, however. First, even in the absence of formal concurrency, there is, and will inevitably continue to be, a vast area of functional overlap. Under any conceivable future constitution, for example, federally owned and regulated operations will always affect provincial environments, and federal operational legislation will continue to cover common ground with provincial environmental protection legislation. Secondly the danger in the proposal of the Joint Parliamentary Committee lies not so much in the concept of concurrency as in the provision for total federal paramountcy. A constitution that sought to avoid jurisdictional gaps by a formal recognition of concurrency, but acknowledged provincial paramountcy on matters where local and provincial concerns should be predominant, would not unduly jeopardize provincial autonomy. The next section will deal with various methods of allocating paramountcy and otherwise dealing with jurisdictional conflicts.

Paramountcy and Conflict Resolution

The inevitability of jurisdictional conflicts over environmental issues has already been touched on. There will always be situations in which enterprises under federal control make an impact on the environment of the provinces in which they operate and activities carried on within one province affect the environment of another province or another country.

To assist in the discussion of the various ways in which these conflicts might be resolved, let us assume two hypothetical situations:

A. The provinces are given jurisdiction over air pollution within provincial boundaries, and the federal Parliament retains responsibility for extraprovincial trucking and rail operations. A province passes legislation requiring all internal combustion engines employed in the province to have certain pollution-control devices that unfortunately reduce the efficiency of the engines by five per cent. Parliament, concerned about energy shortages and the effect of increased fuel consumption on transportation costs, enacts a statute prohibiting the use of such devices on trucks and locomotives engaged in interprovincial traffic.

B. The provinces have jurisdiction over intraprovincial water quality, and Parliament has the power to make laws with respect to interprovincial pollution. A Quebec regulatory body, acting in accordance with provincial legislation, permits a factory to discharge a certain effluent into the headwaters of the St. John River. Considerable environmental damage results downstream in New Brunswick, and there is also a possibility of such damage in the State of Maine, although no complaint has yet been made by American authorities.

We shall return to these illustrations as different methods of dealing with jurisdictional conflicts are discussed.

Before proceeding to that discussion, however, it would be well to deal with a technique by which unnecessary conflicts would be avoided. Reference was made earlier to the problem of interjurisdictional immunity: the fact that certain enterprises operated or regulated by one order of government (usually federal) are sometimes held to be exempt from certain laws of the other order (usually provincial).[37] These situations often arise in the absence of any indication by Parliament that such immunity would be desirable. Such unnecessary immunity could be eliminated by a constitutional stipulation that all enterprises owned, operated, or regulated by one government in Canada, whether federal or provincial, are subject to the laws of every other jurisdiction within whose territory they operate unless and to the extent that the legislation regulating a particular enterprise expressly or by necessary implication provides to the contrary. In that way there would be no 'accidental' exercises of paramountcy. Where immunity was claimed, its validity would then be determined by the applicable paramountcy provisions, to which we now turn.

Federal paramountcy

The present Constitution handles conflicts between federal and provincial statutes by giving a power of pre-emption to the federal order of government in almost every situation. With the exception of old age-pension legislation under section 94A, the Parliament of Canada now has paramountcy whenever a federal law clashes with a provincial law in an area of formal or functional concurrency.[38] This means that in example A hypothesized above, the federal statute would override the provincial anti-pollution legislation, and that in example B, Parliament would have the authority to pass laws for the regulation of any aspect of the factory's operation whose regulation would be necessarily incidental to the control of interprovincial or international pollution.

The Joint Parliamentary Committee on the Constitution of Canada that called for concurrent federal and provincial powers with respect to air and water pollution, recommended what would, in effect, be an entrenchment of the *status quo* as far as paramountcy is concerned in those areas: an express stipulation that federal air- and water-quality legislation be paramount in the case of conflict. Although the Committee stressed the desirability of federal-provincial co-operation, their proposal would, in the final analysis, give Parliament even broader powers than it now has. Their reasons were as follows:

> Apart from the purely legal considerations which call for a paramount Federal power in the area of air and water pollution, there are compelling economic arguments. Because of the disparities in economic terms which exist between the Provinces in

> Canada, to fail to have a paramount Federal power would be to invite Provinces to compete for industrial development on the basis of more relaxed pollution laws. It is only recognizing the obvious to suggest that some economically weaker Provinces would be unable to resist the temptation.
>
> . . .
>
> Although we have provided for Federal paramountcy, this does not mean that we contemplate a total and complete Federal occupation of the field of air and water pollution. Indeed we expect legislative coordination between the two levels. We support Federal paramountcy to ensure, however, that should the national interest require it, the Parliament of Canada can ensure that no Province could become a pollution haven. Of course, it would also ensure that pollution of the air and water of one Province by another, and pollution with international effects, could be governed by Federal legislation if deadlock arose or if there was irreconcilable legislation.[39]

While such an arrangement has the undeniable advantages of simplicity and certainty, it could produce regrettable results in some circumstances.

In type-A situations, the major fault of the *status quo* is that it accords automatic priority to Parliament without regard to functional considerations. It may be that energy conservation and transportation economics should take priority over environmental quality in some instances, but that surely depends on the particular circumstances, which vary from one occasion to another: What is the present condition of the environment in the territory affected? To what extent would exemption of federal transportation enterprises worsen the situation? How seriously would the Canadian economy be injured if those enterprises were forced to comply with the provincial law? To allocate legislative paramountcy without regard to such variables would result in the establishment of regulatory schemes that are out of touch with reality. While it may be contended that Parliament can be counted on to weigh all relevant factors when deciding whether or not to exercise its paramountcy, it is not likely to perform that task with impartiality. Because the basis of federal jurisdiction is usually entrepreneurial (interprovincial transportation, defence, atomic energy, and so on), Parliament can normally be expected, when conflicts arise, to display a bias in favour of entrepreneurial considerations over environmental ones. Even when the basis of federal jurisdiction is primarily environmental — as in the case of the present fisheries power — Parliament is unlikely to weigh the competing interests impartially; one bias merely replaces another.

In situations like example B, where the federal government has no direct interest in the matter, it may be slightly more plausible to regard Parliament as a neutral arbiter of interprovincial disputes. Even in those circumstances, however, absolute objectivity is illusory; such *sub rosa* factors as the relative numbers of Quebec and New Brunswick voters at the next federal election who are likely to be pleased or offended by the decision will seldom be ignored in any politically based technique of conflict resolution. Where there is an international component to the problem, the case for automatic federal paramountcy is strong, provided that the foreign connection is both genuine and significant; a merely formal international element should not be allowed to characterize matters that are substantially intranational in nature.

Provincial paramountcy

Priority could be given to provincial legislation. This is now the case with old age pensions,[40] and both the Joint Parliamentary Committee on the Constitution of Canada[41] and the Task Force on Canadian Unity[42] seem to have approved an expansion of provincial primacy beyond the *status quo*. Although no one ever seems to have proposed it seriously, it would be at least theoretically possible to give the provinces total paramountcy.

Automatic provincial paramountcy in environmental matters would, however, be subject to all the shortcomings of automatic federal paramountcy, with the exception that the bias would more frequently favour environmental protection than entrepreneurial advancement, where the threat to the environment came from enterprises under federal control. And there would be the added problem in interprovincial situations of selecting *which* province should be given priority.[43]

Entrepreneurial paramountcy

It would promote efficiency in resource exploitation and technological development to provide that legislative conflicts be resolved in favour of the jurisdiction having principal responsibility for the operational aspects of the activity involved. This would mean, for example, that in hypothesis A (above) the federal legislation would prevail, and that in hypothesis B, Quebec would have the final word. The economic advantages would be obvious: the easy avoidance of interjurisdictional conflicts would eliminate delays and facilitate long-range planning. It would probably also lead to more sophisticated, better rounded, government regulation of the enterprises involved if one authority were ultimately responsible for all aspects of the operations, including their environmental impact. Greater regard for environmental factors by those in charge of operations would encourage the design of less destructive operating techniques, and greater awareness of operational needs by those responsible for the environment would discourage unrealistic restrictions.

The problem with entrepreneurial paramountcy, of course, is that even more than federal paramountcy (which, for practical purposes, it would closely resemble), it would seriously jeopardize environmental considerations by entrusting them to the care of authorities with a primarily operational orientation. Even the most enlightened hydro-electric engineer or designer of oil pipelines is likely to place a higher value on 'his' or 'her' project than on the surrounding wilderness.

Environmental paramountcy

The last word could be given to the environment by stipulating that, in the event of contradictory legislation, the laws of the jurisdiction whose environment was affected would prevail. If entrepreneurial paramountcy could be described as the 'co-ordination' model, in which ultimate responsibility for both operations and their environmental impact would be under integrated control, this could be called the 'competitive' model: operational and environmental aspects would be in competition whenever multiple jurisdictions were involved, with the former being subjugated to the latter in the event of irreconcilable conflicts.

This arrangement would clearly promote environmental protection, but probably to an unjustifiable extent. There are circumstances in which environmental considerations should properly yield to other, more pressing, needs. In hypothesis A, for example, the damage caused to the environment by exempting federal transportation enterprises from provincial vehicle-pollution laws might be insignificant compared to the resulting benefits to the national economy. Why, in that event, should an important national objective be frustrated by a relatively minor provincial environmental concern? By having to deal with environmental impact in isolation from entrepreneurial benefits, authorities might place a disproportionate emphasis on the former. Moreover the time and expense involved in having to satisfy two competing orders of government could be unduly wasteful for the enterprise concerned. Another problem would be the difficulty of selecting, in multiterritorial situations like hypothesis B, the *particular* affected jurisdiction that would exercise control, and of deciding the extent to which those controls should apply beyond that jurisdiction. Moreover, in international settings, it might involve the surrender of some degree of sovereignty to a foreign Legislature.

Paramountcy divided by subject

As mentioned previously, both the Joint Parliamentary Committee and the Task Force on Canadian Unity appear to have approved a division of paramountcy between the federal and provincial orders of government, presumably on the basis of subject matter. It is difficult, however, to visualize the application of such a provision in many circumstances.

Suppose that the Constitution provided, as the Joint Committee has recommended, that the power to make laws about "air and water pollution" should be concurrent, with federal paramountcy, and that it bestowed provincial paramountcy with respect to "the law of torts and delicts." If Parliament then passed a law permitting private citizens to sue by class action with respect to public nuisance caused by pollution of air or water, would that enactment take precedence over the present Manitoba statute that states that a nuisance action may not be brought with respect to most industrial odours?[44] On the one hand, the federal law should be paramount as 'pollution' legislation; on the other, the provincial law should be paramount as 'tort' legislation. Or suppose that the Constitution gave the provinces paramountcy with respect to "pollution in the province" and gave Parliament paramountcy concerning "interprovincial transportation." Which of the statutes described in hypothesis A would be given priority?

No doubt the courts would be able to decide in many situations that the subject matter of the conflicting legislation related predominantly, in "pith and substance," more to one jurisdiction than to the other; but there would be many instances in which it would be impossible to avoid the conclusion that the subject was as closely related to one field as to another. To deal with such situations of competing paramountcies, it would be necessary to allocate a last-resort 'superparamountcy' to one or other order of government, and all the problems associated with automatic paramountcy devices would resurface.

Paramountcy divided functionally by adjudication

It was suggested earlier that it is impossible to decide in the abstract whether federal or provincial paramountcy would be more satisfactory in situations like hypothesis A; it would depend on the circumstances prevailing at the time. To take another example, in time of war federal 'defence' legislation authorizing the military to devastate a provincial wilderness area for the purpose of tank training or gunnery exercises should have priority, in the writer's view; but this should not be so in peace time, when there is less urgency, and time can be taken to find less destructive training sites and techniques.

The only satisfactory way to distribute paramountcy in order to take account of such variables would be to entrust the task on a discretionary basis to some case-by-case adjudicator. A court or tribunal could be empowered to determine, in situations like examples A and B or the one just mentioned, whether federal or provincial priority would be more suitable, having regard to all relevant circumstances. It would also be able to decide which of competing provincial statutes should prevail in the case of interprovincial conflicts.

It does not require much prescience to foresee objections that would be raised to so radical a proposal. Some would object that it would introduce an intolerable degree of uncertainty into the Constitution. Flexibility unquestionably involves uncertainty. But uncertainty is endemic to constitutions. Certainty is often sacrificed to achieve a variety of other goals, not the least of which is the ability to continue providing good government in a wide variety of unforeseeable future circumstances. If a more flexible paramountcy principle would result in a more effective allocation of constitutional responsibilities than the present automatic rule, it may be worth the cost in added uncertainty.

Many can be expected to protest, as well, that this proposal would thrust on the courts an essentially legislative task for which they are ill suited. Little purpose would be served by rehearsing at length the hoary debate about whether courts can, should, or do legislate generally. In the present context the question is considerably narrower: Are adjudicative bodies well suited to determine which of two contradictory statutes applicable to a particular activity should be permitted to prevail?

It is submitted that the answer to this question is 'Yes'. Indeed a strong case can be made to the effect that courts are *better* suited to perform the task than are legislatures. Courts are sure to be provided by the competing interests with expert evidence on all aspects of the question — social, economic, and so on — thought by any interested party to be relevant. Their facilities for receiving such information are generally superior to those of legislatures. Moreover they are unencumbered by the considerations of politics and patronage that sometimes interfere with impartiality in the legislative arena. Administrative tribunals are often called upon to make similar policy-based decisions, and they generally carry out the function effectively and fairly.

Since a fairly high level of consistency would be required in these decisions, it might not be wise, however, to leave the task to low-level courts. Perhaps conflicts between competent federal and provincial statutes would be best handled by a special constitutional disputes tribunal, with appeal lying to the Supreme Court of Canada.

Delegation

Two factors will dictate a continuing need for large-scale federal-provincial co-operation under any new constitution: the fantastic complexity of many environmental problems, and the fact that any realistic scheme for allocating environmental responsibilities must entrust both orders of government with substantial powers. Careful co-ordination of all governmental control programs will be required. Moreover it will sometimes be convenient for certain functions normally within the ambit of one government to be exercised temporarily or permanently within a particular region by another government or by some intergovernmental body. The *Report* of the Joint Parliamentary Committee on the Constitution of Canada recognized this need, and called for both federal-provincial and interprovincial consultation and co-ordination.[45]

An important technique for achieving intergovernmental co-operation is delegation of legislative and administrative powers. While the existing Constitution permits satisfactory delegation of administrative functions, direct delegation of law-making powers is not possible.[46] This is a shortcoming that should be remedied in any new constitution. Although the Joint Parliamentary Committee did not approve of legislative delegation,[47] and proposed that environmental co-operation be accomplished by other means,[48] there seems to be wide support for the idea.[49] It will be assumed for the purpose of this essay that both administrative and legislative delegation would be possible under a new constitution.

Spending Power

In the past the wealth of the Government of Canada has enabled it to enter fields of provincial responsibility, including some local aspects of environmental management, by means of financial grants or loans conditional on compliance with federal regulations. The Joint Parliamentary Committee on the Constitution of Canada saw a continuation of this federal spending power as a means of achieving federal-provincial co-operation in environmental matters.[50]

This would be a mistake. Any new constitution should attempt to match the governmental responsibilities of each government with adequate financial powers to carry out those responsibilities independently and well. Economic imbalances between the provinces should be rectified by satisfactory fiscal equalization procedures rather than by federal handouts. This is, no doubt, a counsel of perfection; money is never likely to lose its voice altogether. Nevertheless, when Canadians are attempting to design a constitutional instrument for the future, every effort should be made to assign powers on a functionally efficient basis, with equivalent assured financial resources. Although this goal is never likely to be fully achieved, the end product is likely to be considerably closer to perfection than the approach proposed by the Joint Parliamentary Committee. To acknowledge in advance that the constitutional distribution of powers may be frustrated whenever the federal government is willing to pay a suitable price would be a counsel of defeat for those who see value in federalism. It will be assumed for the purposes of this paper that a new constitution would assure all governments the financial resources necessary to carry out their responsibilities and would restrict the federal spending power to uses within federal legislative competence, including, of course, any powers it may receive by delegation.

Four Futures

An attempt will now be made to apply the foregoing thoughts in the context of the four different constitutional options for the future that were postulated at the outset.

Federalism

The most satisfactory allocation of responsibilities for environmental quality in a federal system of a type roughly similar to that which now prevails in Canada seems to be one based fundamentally on the territory affected, but with certain non-territorial features.

The provinces should have primary jurisdiction with respect to the protection of their own internal environments, and the federal Parliament should be responsible for extraprovincial aspects of environmental protection. By 'extraprovincial' is meant those aspects of interprovincial and international pollution that the provinces are incapable of dealing with unilaterally or co-operatively, or that they have not so dealt with, as well, of course, as conditions in the northern Territories. Provincial jurisdiction should extend to the intraprovincial aspects of situations with extraprovincial components so that in circumstances such as those that arose in the *Interprovincial Cooperatives* case,[51] provincial legislation would operate within the province, subject to being pre-empted by contradictory federal legislation aimed at the interprovincial aspects of the problem.

In addition to its responsibility for extraprovincial aspects of environmental protection, the Parliament of Canada would retain operational jurisdiction over various enterprises of national significance located within the provinces; some of these (such as interprovincial railways and pipelines) would endanger the environment, and others (such as national parks and wilderness preserves) would enhance it.

Formal concurrency of federal and provincial powers concerning the environment should be avoided for reasons already stated.[52] However, functional concurrency is unavoidable between provincial environmental powers and federal jurisdiction over both extraprovincial aspects of environmental control and the many federally regulated activities that affect environmental quality within the provinces. To reduce unnecessary conflicts between federal and provincial legislation, the Constitution should declare that all enterprises owned, operated, or regulated by one government in Canada, whether federal or provincial, are subject to all laws of every other Canadian jurisdiction within whose territory they operate, except to the extent that the legislation regulating a particular enterprise provides to the contrary, either expressly or by necessary implication.

Where federal and provincial statutes are incompatible with respect to a given situation or operation, the automatic federal paramountcy that presently applies should be replaced by a discretionary judicial determination stipulating which law should prevail in the circumstances. While many different procedures for making such a determination are conceivable, the task could probably be best performed by a special constitutional conflicts tribunal functioning one level below the Supreme Court of Canada. This tribunal would deal with disputes between provinces, as well as with those between the federal and provincial orders, and it would base its decisions on functional considerations relevant to the particular situation rather than on formal pre-ordained criteria.

Federal-provincial and interprovincial co-operation should be facilitated by making possible intergovernmental delegation of both administrative and legislative powers. The decision to delegate should not be influenced by financial considerations, however; fiscal resources should be adequate to fund any governmental responsibility found to be functionally justified.

To some extent the phenomenon of functional concurrency would operate as a safeguard against the risk that a government with primary environmental jurisdiction might sacrifice environmental quality for some more tempting, but less worthy, short-term benefit. If another government had authority to enact competing legislation that could be accorded paramountcy, the danger that environmental considerations might be abandoned would be somewhat reduced. The involvement of another government is no guarantee of purity, however; both governments may be equally unconcerned about environmental quality. Moreover functional overlap would never be complete; there would remain many areas in which one government had exclusive control. This would be especially true in the northern Territories, where federal authority would extend even to the matters normally within provincial jurisdiction, and where there would therefore be no significant provincial counterpoise to federal powers. To provide some protection against governmental shortsightedness in such one-sided situations, some constitutionally entrenched guarantees would be beneficial.

Three different constitutional safeguards were discussed earlier: liberal access to public information, standing to challenge unconstitutional laws, and a general guarantee of the right to a pure environment. The first two are not peculiar to environmental questions, and it is to be hoped that they would be written into a new constitution in any event. The third, an entrenched right to environmental purity, which would stand beside such rights as freedom of speech, would be both more specific and more radical. It is submitted (though not very optimistically) that it should be no less acceptable on either account. Without it the other two guarantees would not in themselves constitute adequate environmental protection. Another way to achieve such protection would, of course, be to empower the Parliament of Canada to establish minimum standards of environmental quality for the entire country, but such paternalism would be alien to the principles of federalism. If both paternalism and substantial risk to the environment are to be avoided, I see no plausible alternative to a judicially enforceable, general, constitutional guarantee of environmental purity.

Special Status

It is difficult to imagine that a province with the right to special constitutional status in certain respects would choose to alter the basic pattern of jurisdictional allocation outlined above. Of course, if the basic scheme adopted involved more extensive federal powers than has been suggested (say, federal responsibility for air pollution or for the quality of major lakes and streams), a desire on the part of some provinces for greater environmental autonomy might lead to claims of special status. It seems both unlikely and undesirable, however, that the fundamental division of powers relating to the environment would be significantly different from what has been indicated.

A province might be more likely to opt for special status with respect to paramountcy provisions or constitutional guarantees. If the constitution adopted the adjudicative paramountcy provision suggested, or one that would give automatic primacy to federal legislation, it would not be surprising to find one or more provinces seeking a special status whereby provincial paramountcy would be substituted. Similarly some provinces might not wish to go along with any entrenched rights respecting the environment that might be guaranteed to citizens by the national constitution.

The wisdom of special status in general is beyond the scope of this essay. As far as the limited forms of special status discussed herein are concerned, they could probably be tolerated without extreme detriment. A constitution that featured entrenched environmental rights in some provinces, but not in others, and one kind of paramountcy provision for some provinces and another for others, could function reasonably satisfactorily, though the complexity would produce inevitable confusion. However, if the provisions out of which some provinces opted were significant environmental protections, as they would likely be, the cost of special status would include, in addition to the inevitable confusion, a regrettable risk of deterioration in environmental quality.

Separation of Quebec

If Quebec became a completely independent state, the appropriateness of the above remarks to the rest of Canada, assuming that it remained federally united, would not be greatly affected. Their applicability to Quebec would be radically altered, of course.

As far as purely intraterritorial situations were concerned, Quebec would be in an even more powerful position than the provinces of Canada, because her control over the environment would not be counterbalanced by functional concurrency with any federal responsibilities. The case for the entrenchment of environmental rights in the constitution would accordingly be even stronger in relation to Quebec than it would be in relation to Canada.

As far as extraterritorial situations are concerned, international law would replace constitutional law. Questions of interjurisdictional immunity would be replaced by those of sovereign immunity. The Government of Canada, instead of acting as legislator and adjudicator, would become adversary and negotiator on behalf of itself and the provinces bordering Quebec. In view of Quebec's geographic position — virtually surrounded by Canadian territory, its boundaries defined to a significant degree by waters shared with Canada, central Canada's chief route to the Atlantic flowing through its territory, its major air currents and weather systems shared with Canadian provinces and American states — the frequency of international environmental disputes would increase dramatically. Quebec's involvement with Canada and the United States in the International Joint Commission (IJC) or some similar body would be essential. (Conceivably, by the way, the addition of a third party to the IJC might strengthen that organization and make it easier to carry out impartial adjudication, at least in bilateral disputes.) The IJC has had considerable experience — and some success — in dealing with problems of trans-boundary pollution.[53] It suffers, however, from the major weakness of all voluntary international organizations: that on most matters its rulings are advisory only and are not binding on the parent governments. Unless the powers of the IJC were increased, the legal protections available against environmental hazards crossing Quebec's borders in either direction would accordingly be reduced by independence. Those for whom environmental quality is important would therefore have reason to be concerned, at least on that account, by the complete separation of Quebec.

Sovereignty-Association

Inasmuch as sovereignty-association would involve such sharing of powers as two sovereign nations might freely negotiate, it is impossible to say much that would be helpful at this stage about a suitable arrangement of environmental jurisdictions. The white paper issued by the Parti québécois Government of Quebec in 1979 to explain the implications of sovereignty-association dealt only with the economic aspects of environmental matters. The only clues that can be gleaned from the paper concerning its authors' approach to appropriate intergovernmental arrangements for the protection of environmental quality are the facts that:

- The paper places great emphasis on the importance of Quebec's exploiting its own resources independently.[54]
- It is stated that Quebec would "become a full partner in the International Joint Commission."[55]
- The European Economic Community (EEC) is frequently referred to as a suitable model for future Canada-Quebec relations.[56]

The reference to the International Joint Commission would indicate no significant difference, as far as protection of environmental quality is concerned, between sovereignty-association and complete separation. The EEC references may, however, hold out hope that a sovereign Quebec would be willing to enter into arrangements in the environmental field that would involve the surrender of some autonomy to common legislative and judicial bodies with powers greater than those of the chiefly voluntary IJC. It would be a mistake to be overly sanguine on this score; even if Canada and Quebec agreed to emulate the EEC, that organization's environmental protection activities have been relatively recent and, so far, rather limited.[57] Nevertheless, the EEC paradigm would offer two important improvements over the IJC model: its edicts would be binding, and they could embrace intraterritorial, as well as transboundary, environmental problems.

Should Environmental Jurisdiction Be Treated Separately?

We are now in a position to reconsider the question that was deferred at the beginning of this essay: Is it necessary or desirable to deal with environmental protection and enhancement as a discrete item in a new constitution?

The answer seems to be that although discrete treatment cannot hurt and might even be beneficial in avoiding confusion, it is necessary only to the extent that it is desirable to entrench a constitutional right to environmental purity. Any federal constitution is likely to distribute legislative responsibilities on a roughly territorial basis, and all the other provisions suggested above — that is, elimination of unnecessary interjurisdictional immunity, a new paramountcy provision, guaranteed freedom of public information, and standing to litigate public wrongs — would be general stipulations not limited in their scope to environmental matters.

Nevertheless, since I have advocated the creation of a constitutional guarantee of environmental quality, and since it would be beneficial, in any event, to clarify environmental responsibilities in the new constitution, it is submitted that separate treatment should be accorded to environmental matters.

Appendix

Selected Proposals Concerning the Future Constitutional Position of Environmental Management

1. *Quebec's Traditional Stands on the Division of Powers (1900–1976)*, Province of Quebec, 1976:

   Environment

   1970 — Mr. Bertrand states that Quebec cannot allow the federal government to act unilaterally to settle the watercourses question. (Federal-Provincial Conference)

   1971 — Quebec calls for a constitutional provision granting the provinces jurisdiction over environmental protection policies. (Constitutional Conference)

2. *Environmental Management — A Constitutional Study Prepared for the Government of Canada*, J.W. MacNeill, 1971:

   [This lengthy study, the most thorough yet prepared on the subject, does not make specific proposals for constitutional reform, and therefore does not lend itself to extraction and quotation. It must not be overlooked, however. It tends to support a much wider federal role than has been proposed in this paper.]

3. *Final Report of Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada*, 1972:

Chapter 36 — Air and Water Pollution

Recommendations

100. Control over the pollution of air and water should be a matter of concurrent jurisdiction between the Provincial Legislatures and the Federal Parliament, and, as in section 95 of the British North America Act, the powers of the Federal Parliament should be paramount.
101. The concurrency of jurisdiction over air and water pollution would necessitate both Federal-Provincial and Province-to-Province planning and coordination of programs.
102. We endorse the work of the Resources Ministers Council as a means of continuing consultation on matters of renewable resources.

In recent years a totally new challenge has developed from the growing global crisis of the environment. Not only is man learning that the world's resources are finite, but also that their ever increasing consumption, particularly by the economically-developed nations, may even threaten our long-run physical and psychological survival. The dimensions of our ecological crisis are both potentially awesome and immediately urgent.

The rapid growth of population, the immense expansion of industry, and the urbanization of life have been intensified by an exploding and seemingly ungovernable technology. It is not surprising, therefore, that this subject matter, unknown and unthought of in 1867, has emerged in the current review of the Constitution.

In the evidence we heard, several themes dominated: first of all, there was a sense of urgency; also, there was a growing, militant and popularly based anti-pollution movement. The overriding feeling was that positive and extensive governmental action is needed.

Because pollution control is so urgently needed, we feel that any confusion which exists in constitutional powers should be ended as quickly as possible.

Canada is seriously affected, although there is clearly a global scope to the phenomenon of environmental pollution. Lake Erie, we are told, is in danger of dying and her sister lakes may gradually succumb. Wildlife is being poisoned by pesticides. Cities are enveloped in smog affecting health. Rising crescendos of noise threaten tranquillity everywhere. Clean air, clear water and the purity of our soil and our sea products can no longer be assumed in Canada.

Our evidence revealed a deep concern to protect that peace and beauty essential to sustain the human spirit. Our witnesses also recognized that, increasingly, havens of peace and beauty are being surrounded and eliminated by air and water pollution.

It was conceded by virtually all witnesses that concerted action on the international, national, provincial and urban levels of government will be required. Any constitutional approach must, therefore, be flexible.

There seems to be widespread agreement that jurisdiction over pollution is at present complicated at best and confusing at worst. Federal and Provincial sources in the B.N.A. Act for pollution control are many. For example, Provincial jurisdiction may stem from "Property and Civil Rights in the Province", "Municipal Institutions in the Province", "Local Works and Undertakings", "Generally all Matters of a merely local or private Nature in the Province". Federal jurisdiction, on the other hand, depending on the class of subject dealt with in the legislation, might arise from "The Criminal Law", "Navigation and Shipping", "Sea Coast and Inland Fisheries", and "The Regulation of Trade and Commerce".

The possibilities for jurisdictional overlapping here revealed show the difficulties of determining constitutional and political accountability. Although the respective powers are legally and narrowly "exclusive" in the strict sense, pollution problems do not always fit into such neat, compartmental packages. Consequently, the lines of political accountability are not clear. The voter is left with his annoyance; the politician with his constitutional enigmas. What is clear is that the witnesses who appeared before us recognized that pollution has local, provincial, national and international aspects. Rather than getting bogged down as to whether the pollution to be cured was a "Fisheries" or a "Navigation" or a "Management of Public Lands" or a "Local Works and Undertaking" problem, they felt that pollution itself should be the subject matter of concern to Parliament and the Legislatures. They felt that pollution of air and water, because of their many facets, should be a concurrent power shared by both Parliament and the Legislatures.

The object in making air and water pollution a specific head of power is to avoid, as completely as possible, jurisdictional conflicts based on existing powers: for example, whether the legislation is, in pith and substance, in relation to "Public Lands" (Provincial) or "Inland Fisheries" (Federal). The same reasoning compels us to acknowledge that, in the event of conflict between the new concurrent Federal and Provincial powers in the area of air and water pollution, Federal legislation should be paramount. Consequently, we recommend a similar concurrent formulation for jurisdiction over pollution of air and water as already exists in section 95 of the British North America Act, with respect to Immigration and Agriculture. A similar power in this area might read this way:

> In each Province the Legislature may make Laws in relation to the control of air and water pollution in the Province, and it is hereby declared that the Parliament of Canada may, from Time to Time, make Laws in relation to the control of air and water pollution among the Provinces; and any Law of the Legislature of a Province relative to the control of air and water pollution shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

Apart from the purely legal considerations which call for a paramount Federal power in the area of air and water pollution, there are compelling economic arguments. Because of the disparities in economic terms which exist between the Provinces in Canada, to fail to have a paramount Federal power would be to invite Provinces to compete for industrial development on the basis of more relaxed pollution laws. It is only recognizing the obvious to suggest that some economically weaker Provinces would be unable to resist the temptation.

We would envisage, because the new pollution power would be concurrent, that necessarily greater Federal-Provincial and Province-to-Province planning and coordination would result. The superior financial and research capabilities of the Federal Government, especially in relation to the smaller Provinces, can be brought into play through the concurrent power itself and through the Federal spending power, if necessary.

Although we have provided for Federal paramountcy, this does not mean that we contemplate a total and complete Federal occupation of the field of air and water pollution. Indeed we expect legislative coordination between the two levels. We support Federal paramountcy to ensure, however, that should the national interest require it, the Parliament of Canada can ensure that no Province could become a pollution haven. Of course, it would also ensure that pollution of the air and water of one Province by another, and pollution with international effects, could be governed by Federal legislation if deadlock arose or if there was irreconcilable legislation.

The whole question of environmental management is a very broad one. It covers not only pollution control but many other subjects such as land use control, control over mining, lumber, wildlife and fish, agriculture, land reclamation and abandonment, weather forecasting and weather modification, recreation and leisure activities, transportation, electric power, multiple-use water management, housing and urban planning and noise abatement.

It is not possible, at the moment, to see how far this concept goes. Consequently, we have rejected the idea of describing the

> specific pollution power in the Constitution as a power over "environmental management". That is why we have limited our recommendations to a constitutional formulation to cover jurisdiction over air and water pollution.

4. *Communiqué, Regina Premiers' Conference*, 1978:

> . . . the Premiers, in the course of their discussion in Regina, have reached agreement upon a number of additional substantive matters, on which federal views are invited:
>
> – the establishment of an appropriate provincial jurisdiction with respect to fisheries.
>
> – confirmation and strengthening of provincial powers with respect to natural resources . . .

5. *Harmony in Diversity — A New Federalism for Canada*, Province of Alberta, 1978, p. 24:

> 6. That the existing sections in the British North America Act protecting provincial ownership and control of natural resources be strengthened.
>
> . . .
>
> 12. That sea coast and inland fisheries be a concurrent power in the Constitution, with provincial paramountcy.

6. *Towards a New Canada*, Canadian Bar Association, Committee on the Constitution, 1978, Chapter 19, p. 107:

> *Recommendations*
>
> 1. The Constitution should expressly provide that the provinces have exclusive legislative power respecting the exploration, exploitation, conservation and management of all natural resources in the province.
> 2. The natural resources of the public domain in the provinces should continue to belong to the provinces.
> 3. The federal Parliament should have exclusive legislative power respecting seacoast fisheries; the provinces should have exclusive legislative power respecting inland fisheries in the province.
> 4. The provinces should have exclusive legislative power respecting water resources in the provinces, subject to the concurrent and paramount power of the federal Parliament to legislate respecting situations having extraprovincial effects.
>
> . . .
>
> 7. The federal Parliament and the provincial legislatures should have concurrent legislative power respecting atomic energy, with federal paramountcy.

7. *A Future Together — Observations and Recommendations*, Task Force on Canadian Unity, 1979, pp. 125–26 (emphasis added):

> 32. The principal roles and responsibilities of the provincial governments should be:
>
> i — the social and cultural well-being and development of their communities;
>
> ii — provincial economic development, including *the exploitation of their natural resources*;
>
> iii — property and civil rights; and
>
> iv — *the management of their territory.*
>
> . . .
>
> 40. In devising a new distribution of powers, the following steps should be taken:
>
> i — broad areas of governmental activities should first be identified. Such broad areas might include external affairs, defence, economic policy, transportation, communications, natural resources, administration of justice and law enforcement, the status and rights of citizens, culture, health and welfare, *habitat and the environment*.

8. *A New Canadian Federation*, Quebec Liberal Party Constitutional Committee, 1980, pp. 98 and 118:

> *Recommendations 21*
>
> 1. The constitution should affirm the priority rights of all Canadians to the natural resources of their country.
>
> 2. The constitution should affirm the provinces' right of property over natural resources found on their territories and should maintain their exclusive jurisdiction in the management and regulation of natural resources including, among other things, mining resources, oil, gas, hydro-electric resources, lands and forests, save for the exception stated in the following paragraph.
>
> 3. The constitution should entrust to the provinces the right to manage and regulate nuclear energy, limited by the legislative paramountcy of the central government in those matters pertaining to defence, national security, pollution and international responsibility which are implied in the use of fissionable matter.
>
> . . .
>
> 7. The constitution should entrust to the provinces the right to manage and regulate the underwater resources situated in territorial waters as well as the right to manage and regulate the underwater resources located on the continental shelf.

8. The constitutional reform process should provide for a mechanism to define borders in order to precisely define the territorial waters of each province as well as the continental shelf areas which fall under their respective jurisdictions.
9. The constitutional [reform process] should allocate to the provinces the right to manage and regulate interior and coastal fisheries provided that the provinces' coastal fisheries be subject to the federal government's jurisdiction over navigation, protection of the species and the environment.

Recommendations 25

. . .

3. The constitution should make the provinces responsible for the protection of the environment, especially for plant and animal life and water, and for the management of these resources, as well as for the regulation of hunting, subject to those restrictions flowing from international treaties.
4. There are four exceptions to the general principle stated in the preceding recommendation and the federal government should have jurisdiction over these matters:
   a) the right to impose penalties on the more serious pollution offences which threaten personal safety and property, by virtue of its power to enact a Criminal Code;
   b) the protection of coastal, interprovincial and international waters;
   c) nuclear pollution; and
   d) the prevention and punishment of pollution offences arising from maritime or aerial navigation.

9. *Québec-Canada: A New Deal*, Gouvernement du Québec, 1979, p. 56:

> . . . Québec will respect the agreement on the St. Lawrence Seaway and will become a full partner in the International Joint Commission.

Notes

1. British North America Act, 1867, 30 and 31 Vict., c. 3, s. 91(12); "sea coast and inland fisheries."

2. *Ibid.*, s. 92(5): "The management and sale of the public lands belonging to the Province and of the timber and wood thereon."

3. *Ibid.*, s. 109: "All lands, mines, minerals, and royalties belonging to the several Provinces . . . at the union . . . shall belong to the several Provinces . . . in which the same are situate or arise . . ."

4. See Dale Gibson, "Constitutional Jurisdiction Over Environmental Management in Canada," *University of Toronto Law Journal* 23 (1973): 54–73.

5. For example, Gibson, "Constitutional Jurisdiction . . .," and Gerald A. Beaudouin, "La protection de l'environnement et ses implications en droit constitutionnel," *McGill Law Journal* 23 (1977): 207–24. Not everyone is satisfied with the present balance, however; see, for example, Paul Emond, "The Case for a Greater Federal Role in the Environmental Protection Field: An Example of the Pollution Problem and the Constitution," *Osgoode Hall Law Journal* 10 (1972): 647–80. See generally J.W. MacNeill, *Environmental Management: A Constitutional Study Prepared for the Government of Canada* (Ottawa: Information Canada, 1971).

6. See, in addition to the works quoted in the Appendix and the articles cited in note 5, Stanley B. Stein, "Environmental Control and Different Levels of Government," *Canadian Public Administration* 14 (1971): 129–44; Henry Landis, "Legal Controls of Pollution in the Great Lakes Basin," *Canadian Bar Review* 48 (1970): 66–157; R.T. Franson and P.T. Burns, "Environmental Rights for the Canadian Citizen: A Prescription for Reform," *Alberta Law Review* 12 (1974): 153–71; Paul Emond, "Participation and the Environment: A Strategy for Democratizing Canada's Environmental Laws," *Osgoode Hall Law Journal* 13 (1975): 783–837; David Trezide, "Alternative Approaches to Legal Control of Environmental Quality in Canada," *McGill Law Journal* 21 (1975): 404–27.

7. Criminal Code, R.S.C. 1970, c. C–34, s. 176.

8. For example, Fisheries Act, R.S.C. 1970, c. F–14. The constitutional limits of this power were examined by the Supreme Court of Canada in two recent decisions: *Northwest Falling Contractors Ltd.* v. *The Queen*, (1981) 113 D.L.R. (3d) 1 (S.C.C.) and *Fowler* v. *The Queen*, (1981) 113 D.L.R. (3d) 513 (S.C.C.)

9. S.C., 1970–71–72, c. 47.

10. R.S.C. 1970 (1st Supp.), c. 5.

11. British North America Act, s. 91(27).

12. *Ibid.*, s. 92(13,: "property and civil rights in the Province"; s. 92(16): "generally all matters of a merely local or private nature in the Province."

13. *Ibid.*, s. 92(14): "the imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section." See, for example, *Re Nakashima and the Queen*, (1975) 51 D.L.R. (3d) 578 (B.C.S.C.)

14. Direct authority in support of this proposition is surprisingly difficult to find, especially in the environmental field. The power of Parliament to tamper with civil real property rights as a necessary incident of railway legislation was, however, upheld in *Attorney-General of Canada* v. *C.P.R. and C.N.R.*, [1958] S.C.R. 285. That Parliament may legislate respecting civil remedies for interprovincial water pollution seems implied in the reasons for judgment of at least Pigeon, Martland, and Beetz, JJ., in *Interprovincial Cooperatives Ltd.* v. *The Queen*, (1975) D.L.R. (3d) 321 (S.C.C.) Even in *MacDonald* v. *Vapour Canada Ltd.*, (1976) 66 D.L.R. (3d) p. 1 at p. 25 (S.C.C.), where a federal provision resulting in a civil remedy was struck down, and there are dicta (for example, at p. 25) attacking the civil nature of the provision, the *ratio decidendi* was the absence of any basis for federal legislation on the subject, and other civil remedies included in the statute were left intact.

15. The airspace was held not to be within the province by the Manitoba Court of Appeal: *Re The Queen and Air Canada*, (1978) 86 D.L.R. (3d) 631. On appeal the Supreme Court of Canada found it unnecessary to deal with the question: (1980) 111 D.L.R. (3d) p. 513 at p. 521.

16. *Cardinal* v. *Attorney-General of Canada*, (1974) 40 D.L.R. (3d) 553 (S.C.C.)

17. Dale Gibson, "Interjurisdictional Immunity in Canadian Federalism," *Canadian Bar Review* 47 (1969): 40–61.

18. See text p. 130.

19. See text pp. 130–31.

20. See Dale Gibson, "Measuring 'National Dimensions'," *Manitoba Law Journal* 7 (1976): 15–27, where it was argued that such is the test under the present Constitution. Although the reasoning of Pigeon, Martland, and Beetz, JJ., in *Interprovincial Cooperatives Ltd. v. The Queen*, (1975) 53 D.L.R. (3d) 321 (S.C.C.) and perhaps also the majority reasons in *Reference Re Anti-Inflation Act*, (1976) 68 D.L.R. (3d) 452 (S.C.C.) seem to refute this view, it is submitted that it is, in any event, a principle that should be embodied in a new constitution.

21. British North America Act, s. 91 (preamble).

22. Assuming, of course, that the constitution contained no more specific power relating to international relations.

23. British North America Act, preamble.

24. David Estrin and John Swaigen, eds., *Environment on Trial: A Citizen's Guide to Ontario Environmental Law* (Toronto: Canadian Environmental Law Research Foundation, 1974), pp. 311–13.

25. See, for example, Franson and Burns, "Environmental Rights for the Canadian Citizen."

26. British North America Act, s. 95.

27. *Ibid.*, s. 94A.

28. *Ibid.*, s. 92(5).

29. *Ibid.*, s. 91(12).

30. *Ibid.* s. 91(27).

31. *Ibid.*, s. 94A, old age pensions. In this case provincial legislation has priority.

32. *Interprovincial Cooperatives Ltd. v. The Queen*, (1975) D.L.R. (3d) 321 (S.C.C.)

33. *Ibid.*, per Pigeon, Martland, and Beetz, JJ. at p. 351 ff.

34. *Ibid.*, per Ritchie, J., p. 343 ff.

35. Canada, Parliament, Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Final Report* (Ottawa, Queen's Printer, 1972), p. 91. (Hereinafter cited as Special Joint Committee, *Report*.) The report was careful to restrict its recommendations to air and water pollution, noting at p. 92 that the more general question of "environmental management" is as yet too broad and uncertain to be dealt with as a whole.

36. Beaudouin, "La protection de l'environnement . . . ." p. 224. The Task Force on Canadian Unity, on which Dean Beaudoin served, was generally sceptical of formal concurrency: "Concurrent jurisdiction should be avoided whenever possible through a more precise definition of exclusive powers." Task Force on Canadian Unity, *A Future Together* (Ottawa: Minister of Supply and Services Canada, 1979), p. 126, recommendation 38(i).

37. See text p. 130.

38. See Bora Laskin, "Occupying the Field: Paramountcy in Penal Legislation," *Canadian Bar Review* 41 (1963): 234–63 and W.R. Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada," *McGill Law Journal* 9 (1963): 185–99.

39. Special Joint Committee, *Report*, p. 92.

40. British North America Act, s. 94A.

41. Special Joint Committee, *Report*, recommendation 50. For air and water pollution they called for federal paramountcy, however: see p. 92.

42. Task Force on Canadian Unity, recommendation 38(ii).

43. The *Interprovincial Cooperatives* case, note 20, shows that the Supreme Court of Canada has not yet settled on a basis of selection in such situations.

44. The Nuisance Act, C.C.S.M. 1976, c. N 120, s. 2.

45. Special Joint Committee, *Report*, recommendations 101 and 102.

46. *Attorney-General of Nova Scotia* v. *Attorney-General of Canada and Lord Nelson Hotel*, [1951] S.C.R. 31 (S.C.C.)

47. Special Joint Committee, *Report*, recommendation 51. The Canadian Bar Association's Committee on the Constitution agreed: *Towards a New Canada* (Toronto, 1978), Chapter 11, recommendation 5.

48. Special Joint Committee, *Report*, p. 92. The methods suggested were the federal spending power and continued use of the Canadian Council of Resources Ministers.

49. See, for example, Task Force on Canadian Unity, recommendation 5; Constitutional Committee of the Quebec Liberal Party, *A New Canadian Federation* (Montreal, 1980), recommendation 13.

50. Special Joint Committee, *Report*, p. 92. It should be noted, however, that the same report called for certain general restrictions on the manner in which the spending power would be utilized (recommendations 56, 57, and 58), as well as for access of both orders of government to all fields of taxation (recommendations 54 and 55).

51. *Interprovincial Cooperatives Ltd.* v. *The Queen*, (1975) D.L.R. (3d) 321 (S.C.C.)

52. Task Force on Canadian Unity, recommendation 38(i).

53. See L.M. Bloomfield and Gerald F. Fitzgerald, *Boundary Waters Problems of Canada and the United States (The International Joint Commission 1912–1958)* (Toronto: Carswell, 1958).

54. Québec, Conseil exécutif, *Quebec-Canada: A New Deal* (Quebec: Éditeur officiel, 1979), p. 87 ff.

55. *Ibid.*, p. 56.

56. *Ibid.*, p. 48, for example.

57. See, for example, P.S.R.F. Mathijsen, *A Guide to European Community Law*, 2d ed. (London: Sweet & Maxwell, 1975), p. 161; and Eric Stein *et al.*, *European Community Law and Institutions in Perspective: Text, Cases and Readings* (Indianapolis: Bobbs-Merrill, 1976).

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Foreign Policy

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Foreign Policy

Introduction

The purpose of this paper is to consider the four projected options for a new Canadian constitution in terms of their implications for foreign policy. By agreement with other contributors, however, the analysis will exclude questions of economics and international law, which are considered elsewhere in the work, and will give only cursory attention to national defence.

It might reasonably be argued that this restriction precludes effective treatment of the subject that I have been assigned, for there is a sense in which little remains of 'foreign policy' after its legal, economic, and security ingredients have been removed. Moreover it is hard to make predictions pertaining to what does remain, subject as that is to the influence of a host of causal forces that are themselves constantly changing. In these circumstances even the most daring of forecasters is wise to begin with provisos. They protect his flank. They also remind his readers that the study of politics is an untidy discipline and one not very forgiving of those who use it to reconnoitre the future. A statement of hesitations — and of working assumptions — therefore follows. It is, necessarily, incomplete.

Assumptions and Cautions

It is difficult, first of all, to decide what to include under the heading of 'foreign policy'. The problem stems partly from the complexity of the modern international agenda. Scholars and foreign service officers alike once thought it reasonable to consider foreign affairs primarily in politico-security terms. In appropriate instances, they might recognize the international distribution of economic interests and capabilities as an important causal or motivating force, but the focus of their analytical attention was on the political and military behaviour to which that force gave rise. Such a perspective made possible, not only an intellectual division of labour among academics, but also a functional division of labour among departments of government. Foreign offices were regarded by their domestic equivalents as entities apart.

In recent decades, however, there have been dramatic increases in both the range and intensity of the relationships between different national communities. Few enterprises of government are now immune to influences from abroad. Almost every ministry of government, therefore, has developed an interest in external affairs. Far from being entities apart, foreign offices have come to be viewed more often as obstacles in the way. A list of subjects considered by intergovernmental conferences in the past few years would include the control of crime, the sharing of satellites, the construction of habitats, the distribution of food, the constraint of terrorism, the management of populations, the pricing of petroleum, the regulation of multinational firms, the conservation of wildlife, and the cleansing of the environment. Such a list would show at once how fuzzy the edges of 'foreign policy' have become. To distinguish foreign policy from the conduct of public policy at large thus requires, more than ever, arbitrary decisions.

Defining 'foreign policy' involves conceptual difficulties, too. Should foreign policy be considered in relation to specific problems or *in toto* as an 'across-the-board' abstraction? Should it be identified by its objectives, direct or indirect, short-term or long-term? Or by its strategies of alignment? Or by its diplomatic tactics and methods? Or by some patterned combination of these, as implied, for example, in the notion of an international 'role' or 'orientation'?[1] In practice all these criteria and doubtless more are very common, and sometimes they appear together in the same exposition, depending on the evolving purposes of a particular analysis. Even if all of them were employed, however, they would not fully solve the present analytical problem since to inquire into the foreign policy implications of optional constitutional arrangements is to ask, first, what pertinent changes each option would bring about in the international (and domestic) environment, and secondly how these changes would affect, not merely the agenda of the decision makers, but also their capabilities. The ensuing foreign policy behaviour, however its tenor is determined, thus becomes a secondary, rather than a primary, effect, a 'dependent variable' that is one step removed from its primary cause.

It is obviously impossible to deal here with the international aspects of all the many fields of public policy that would be affected by each of the constitutional options considered in this work. The treatment, therefore, will be very general, and it will focus largely on the impact that these various options might have on diplomatic capabilities and effectiveness. It should be understood that to approach the problem from this perspective may prejudice the issue to some extent since, from the standpoint of diplomatic efficacy, 'big and centralized' may be better than 'small and devolved'. In any event the reader should certainly be aware that an enterprise of this sort puts many balls in the air, and not all jugglers would seek to keep the same selection aloft.

There is another obvious difficulty best identified by the question, "Foreign policy implications *for whom*?" For Canada inclusive of Quebec? For Canada without Quebec? Or for Quebec alone? Objectivity and detachment, as well as the structure of the project's research design, together suggest the answer, "For all three." It should be understood, however, that the composition of the 'states' or 'régimes' whose 'foreign policies' are being examined is itself undergoing constant change, and this circumstance not only complicates the exposition, but leads to confusing shifts of focus. The problem is aggravated slightly by the asymmetry of the options list. While this list identifies four broad types of potential constitutional development within Canada, from the international point of view it really serves to distinguish only two: that is, the situation in which Quebec would act as a sovereign power in international affairs (Options C and D) and the situation in which it would not (Options A and B). The 'independent variable' is thus being manipulated, at least in the area of external affairs, in asymmetrical degrees.

Still another difficulty common to most hypothetical constructions in the social sciences arises from the presence of hidden assumptions. The survey of constitutional options calls, in effect, for the fourfold manipulation of one complex independent variable: the constitutional arrangements governing Canada and Quebec. It is clear, however, that the implications for foreign policy of constitutional change depend heavily on many other factors both at home and abroad. Imagine, for example, a constitutional change that happened to coincide with an abrupt termination of foreign shipments of oil to North America. The results in that circumstance might be very different from those that would follow if the change occurred at a time when external oil supplies were secure. It is impossible in an analysis of this kind to take into account the potential impact of all such hypothetical developments. To resolve the problem, therefore, the analyst must put most of the forces of history 'on hold' and assume that other environmental conditions will remain more or less constant while he manipulates in his imagination the variable in which he is particularly interested, in this case, the Constitution. I shall try from time to time to call explicit attention to some of the more significant assumptions, but it will be obvious that numerous others, many of them hidden, are implicit in the discussion. Except when I indicate otherwise, it will be assumed that no fundamental changes have occurred within the international environment and that the current general patterns of international politics are still in place.

It may be useful to notice, incidentally, that the problem of implicit assumptions goes beyond the impact of completely extraneous factors, for in the real world of politics, the way in which a given constitutional change comes about might very well be as significant, at least in the short and medium terms, as the change itself. A transition to Option C (sovereignty for Quebec), for example, might yield very different results if it developed through processes of amicable negotiation from those that it would yield if it developed in circumstances of deepening political enmity or, even worse, of military or para-military conflict. For the most part the present analysis assumes that the transition to a new constitutional arrangement has been peaceful and that the political conflicts involved have been prosecuted by normal constitutional processes rather than by military, para-military, or other extra-constitutional means. It is possible to argue that without this assumption, the option of sovereignty-association would not be feasible at all. Nonetheless, the premise is fundamentally significant to the analysis as a whole, and it might well prove to be highly unrealistic if a serious drive for independence were to develop again in Quebec.

Option A: Reformed Federalism

Option A contemplates a re-arrangement of the division of governmental powers under a federal structure. It amounts to a continuation of the present system, albeit with adjustments and reforms designed to accommodate the ever more conflicting interests of the two principal levels of government. The option assumes that the diversities within Canada are not great enough to prevent their reconciliation by means that are consistent with the principles and practices of constitutional democracy as interpreted in Western liberal societies, and in a way that supports a sufficient measure of national unity to sustain a single state. It makes the further assumption that national unity can be achieved most effectively through a system in which all of the second-level units of government (in this case, the provinces) are formally invested with the same constitutional powers and responsibilities, despite their different political and economic resources, and ethnic, social, and cultural characteristics.

Since peaceful internal adjustments of this kind do not alter the number or the weight of the international 'personalities' involved, they offer no particular difficulty from the perspective of the international community. Foreign governments and international organizations could be expected to regard such changes as essentially domestic matters. Some of the relevant authorities in foreign countries would be interested in the implications of the modified system for Canadian *policies* in various fields, and in a few capitals, at least, there might be moderate concern about their eventual impact on Canadian diplomatic practice and on the flexibility of Canadian negotiators. But, in the final analysis, constitutional amendments of the sort projected under Option A would have, at most, a negligible effect on the international environment within which Canadian foreign policy is conducted and to which it must respond.

The significance of Option A for foreign policy, therefore, would be expressed primarily in its impact on the processes whereby Canadian decisions about external affairs are made and implemented. These processes might undergo quite significant changes in detail, and this development could have substantive policy implications in particular fields: that of energy, for example. But it seems improbable that in broad outline decision-making practices would differ substantially from the present ones. The likelihood that innovations in this area would be minimal stems from the fact that, no matter how the division of powers and responsibilities is arranged internally, as long as only one federal government is recognized internationally as the legal 'spokesman' for Canada, mechanisms broadly similar to those already in place will *have* to be maintained in order to permit the provinces to be actively involved in the making and conduct of 'foreign policies' that impinge on provincial areas of jurisdiction. Such mechanisms are also necessary to ensure that Canada's negotiating positions abroad are as consistent and coherent as possible.

Most of the ingredients of the current system were developed in the late 1960s. Initially they were the result of the conflict between Ottawa and Quebec over the latter's claim to the right to conduct its own relations directly with foreign powers in areas of provincial jurisdiction. The federal government considered the issue particularly important because the governments of France and of a number of francophone states in Africa were apparently willing to give *de facto* support to Quebec's diplomatic aspirations. If this support went unchallenged, it might eventually lead to recognition of Quebec as an independent state capable of acting unilaterally under international law. The problem was not confined entirely to Quebec, however, since other provinces, too, had begun to discover that matters falling within their spheres of constitutional responsibility were increasingly subject to international influences and hence to the outcomes of international diplomacy. The control of pollution, the conservation of energy and of other resources, the management of communications, the exploitation of the sea and seabed, the production and distribution of food: all these issues and many others like them had been catapulted into the international arena as a result of a host of technological, economic, demographic, and other developments, but they were all of direct and constitutionally legitimate interest to provincial authorities. In short, while Quebec's demands might pose the most dramatic of the provincial challenges to the ultimate survival of the Canadian state, they have had their counterparts in other provinces as well.

The mechanisms that evolved as part of the federal response to this challenge fell into two main categories.[2] The first category included legalistic mechanisms developed primarily to protect the federal government's position in the international community. More specifically these mechanisms were designed, on the one hand, to safeguard Ottawa's international status as the recognizably 'sovereign' Canadian authority abroad and, on the other, to protect federal agencies from being held responsible for the implementation of international agreements that had been reached entirely through provincial action. They included, for example, exchanges of notes between the federal government and the interested foreign power; these notes (the so-called '*Ad Hoc* Covering Agreements') give explicit federal assent to arrangements concluded between the latter and a provincial régime. Notes of this kind could also be drafted less restrictively in order to provide an umbrella authorization for the conclusion in the future of broadly similar arrangements (General Framework Agreements or *Accords Cadres*) within specific fields. Mechanisms in this category also included a system by which the federal government could act on behalf of a given province as the signing agent *vis-à-vis* a foreign power while at the same time concluding explicit 'indemnity' agreements with the provincial authorities. The latter thereby effectively guaranteed to implement the terms of the treaty and to accept liability for any default.

Devices within the second category were more procedural than legalistic. They were designed to accommodate provincial governments by directly involving them, as constitutionally appropriate, in the processes by which foreign policy decisions were made. One of the devices, for example, consisted of a general federal commitment to consult with provincial authorities before acceding to international conventions affecting provincial interests, and to circulate for information purposes the documentation of international agencies concerned with matters under provincial jurisdiction. Ottawa also promised to include in Canadian delegations to international conferences with provincial relevance representatives of the provinces, sometimes as chairmen or in other positions of leadership, and to consult generally with the provinces in the development of federal programs abroad that had an impact on provincial responsibilities. These arrangements would apply, for instance, to the design of external assistance programs involving the recruitment and assignment overseas of large numbers of teachers from provincial school systems.

Again, the purpose of these various procedures was to protect Ottawa's position as the authoritative and ultimate representative of Canada in intergovernmental dealings abroad, while making it possible for provincial authorities to play active roles in initiating, developing, and even negotiating policies that had international dimensions bearing on provincial responsibilities. The entire system, however, was and still is heavily dependent on the presence of a substantial measure of goodwill and commonality of over-all purpose among the federal and provincial authorities, as well as on the willingness of federal politicians and officials to give genuine meaning to their promises of consultation. It requires that foreign policy conflicts between the two levels of government be resolved either by processes of mutual give-and-take or by the full retreat of one of the parties. The alternative is a sectoral breakdown in the foreign policy process with the result that the question at issue is either lost abroad by default or is left indefinitely on the shelf. Since most issues that are important enough to generate significant domestic intergovernmental conflict also hazard substantial political, diplomatic, or other penalties if they are left in a policy vacuum, such breakdowns are relatively rare, although they do sometimes occur.[3] But the possibilities for an escalation of federal-provincial tensions, short of a total breakdown, are obviously very great, and the willingness of the parties involved to accept the politics of give-and-take therefore remains essential to the effective operation of the system.

The point of this discussion is not to argue past history or current affairs, but to stress that the same general arrangements that now exist would still be necessary in the wake of the kinds of constitutional amendments envisaged under Option A. These arrangements might differ in detail and in degree, but not in kind. International affairs have come to impinge directly or indirectly on almost every activity of government. In these circumstances no practicable internal division of powers is available that would resolve the problem of jurisdictional overlap in dealings abroad. If the basic structure of a single state is to be maintained, therefore, mechanisms will still be required that are designed to accommodate the two principal levels of government in the policy-making process and to provide legal cover for provinces wishing to conclude their own agreements with foreign powers. Moreover it is reasonable to argue that the importance of these devices would be significantly increased to the extent that constitutional amendments produce an even greater decentralization of powers and responsibilities than we have now. It is also possible that these devices would function less easily since the opportunities for policy disagreement would be enlarged, and the areas of federally controlled consensus reduced.

When the various legal and procedural arrangements described above are working effectively, they do, in some sense, 'solve' the problem. But they also have costs. For example they can introduce significant delays into the policy-making process, particularly when more than one province is involved, and when provincial views are diverse. They may also reduce both the flexibility and the credibility of Canadian negotiators abroad. The first reduction may come about because the difficulty of securing an agreed position at home may make adjustments in response to the bargaining initiatives of foreign governments more difficult; the second reduction may occur because it may become known internationally that Canadian diplomats cannot always guarantee the acceptance at home of the foreign commitments they undertake.[4] The procedures can lead, in short, to a condition of 'co-ordination overload' that can seriously damage the capacity of the foreign service to respond with maximum tactical effectiveness to external needs and opportunities. This incapacity intensifies a problem already made serious enough by the accelerating involvement in activities abroad of nominally 'domestic' departments of government and by the consequently weakened capacity of the Department of External Affairs to maintain effective surveillance, much less control, of the full range of Canada's international relations.

In addition the process of reaching concerted policy positions through mechanisms of federal-provincial negotiation can help to erode the foundation of public accountability on which the parliamentary system is based. This is partly because the negotiations themselves must often be conducted behind closed doors. Otherwise the give-and-take required for the resolution of disagreements may become politically difficult for the participants, and there may be an inconvenient loss of bargaining advantage to interested foreign powers. The result, however, is that legislative institutions at both the federal and provincial levels are presented with a *fait accompli*. Ministers, moreover, who in other circumstances might be held unequivocally responsible for their 'decisions', are now in the position of being able to 'pass the buck', asserting, in effect, that they have done their best, given the intransigent attitudes of their provincial adversaries. In this they may be right if, indeed, 'power' has passed, not from Ministers to mandarins (although that is a factor, too), but from persons to processes.

Ultimately, of course, a system that lays such emphasis on establishing a consensus among so many powerful governments, each with its own peculiar mix of political constituencies, is bound to have an impact on the substance of policy itself. In some contexts there may be no disagreement at all. In others only one or two provinces may be interested. But in many agreement will be possible only at the level of the lowest common denominator, and this may inhibit, where it does not actually prevent, the development of an effective national policy.[5]

The significance of these various liabilities is difficult to measure with precision in terms of substantive 'national interest', although indicators are easily obtained in the form of lamentations by officials in the foreign service and by their negotiating counterparts abroad.[6] The problems, in any event, have to be weighed against the benefits that have ensued for the maintenance of federal-provincial amity and the preservation of the present division of powers. The ultimate defence of any decentralized system of government rests, after all, on the assumption that in certain fields 'the people' are better served by policies obtained from regional, rather than from national, rulers. It should be understood, however, that if the current arrangements were applied in the context of an even greater measure of decentralization, their 'foreign policy' costs, as defined by the general criteria of diplomatic efficacy discussed above, would be correspondingly increased. Whether these increases would matter very much would depend on the nature of the decentralization. Even if they did not, the evaluation could be expected to vary with the political preferences of the assessor, as well as with his empirical judgement. To the extent, for example, that the changes led to a significant improvement in the psychic or other satisfactions of Québécois, among others, it could be held that they were worth the diplomatic price.

In the absence of a clear indication of the areas in which the decentralization would occur, it is difficult to be more specific about its implications. It seems obvious, however, that decentralization would be most noticeable, not in the politico-security field, but in the 'functional' areas of trade in raw materials and finished goods and services, capital movements, tourism, cultural activities, environmental interdependencies, and the like. Politico-security matters could be expected to remain in federal hands under *any* constitutional framework premised on the continuation of Canada as a single state. It seems highly improbable, for example, that defence policy would be directly influenced, although there might be an indirect impact if the new arrangements produced major changes in federal tax revenues or otherwise altered Ottawa's capacity for defence spending. Setting aside the pertinent 'functional' international organizations such as, for example, the specialized agencies of the United Nations, this means that the principal impact of decentralization would be experienced in relation to the countries with which Canada has the greatest number of 'functional' interactions. The principal impact, then, would be perceived most immediately and most pervasively in Canada's relations with the United States, followed, at some considerable distance, by those with the countries of Western Europe, including the United Kingdom, and Japan. Relations with the Third-World members of *la francophonie* already constitute a special case and probably would not be much affected. In most other contexts the impact of decentralization on Canadian foreign relations would be marginal.

The special case of the United States, however, might well have very great significance, particularly from the viewpoint of Canadians who are anxious about the pervasive American impact on Canadian life. Even now the development of a clearly defined strategy for dealing with this problem seems as daunting an administrative challenge as it is a political one,[7] and there is little doubt that the problem would be exacerbated by almost any additional decentralization of powers within Canada. The recent and continuing quarrel between Ottawa and Alberta over the volume and pricing of sales of Canadian energy resources to the American market provides an obvious and startling indicator of the potential difficulties. There can be no doubt, either, that the Americans would obtain substantial bargaining advantages, even within the confines of specific issues, from the increased opportunity to 'divide and conquer' that a still greater measure of Canadian devolution would give them.[8] The same phenomenon could be expected to arise in lesser degree in relation to the European Economic Community and in other contexts in which hard-bargaining ('Yankee trading') over substantive functional issues is common. The cumulative effect of such developments over the long term is hard to predict, but there is certainly a very great risk that they would ultimately strengthen, rather than weaken, the centrifugal economic and psychological forces of Canadian politics and hence encourage the process of national disintegration. From the 'federalist' point of view, the danger would presumably be greatest if the decentralization were to include a complete federal abandonment to the provinces of the regulation of foreign direct investment, as well as control over the export of energy and other natural resources including those in the coastal economic zone.[9] But the danger would also be present in cultural fields and in areas of indirect economic significance: for example the control of electronic media and communications, and the regulation of industrial pollution.

To repeat, however, these complications of Option A arise largely in the domestic Canadian environment. Although further measures of decentralization might create exploitive opportunities for foreign powers (and for certain non-governmental agencies such as multinational corporations), from the point of view of international politics they would be essentially non-controversial. At particular international conferences, the composition of Canadian delegations and the status of provincial representatives assigned to them might sometimes cause confusion, and occasionally even irritation.[10] But assuming the visible preservation of the legal primacy of the federal government through protective mechanisms similar to those already in place, this would not be an insurmountable problem.

Option B: Special Provincial Status

Option B is concerned with the possibility of assigning special status to one or more provinces or regions; it implies a devolution of powers and responsibilities to the provincial or regional level in one or a few instances, but not in the same degree to all. While at first glance Option B seems to define a situation in which at least one of the provincial or regional authorities would obtain powers greater than those it holds under present constitutional arrangements, theoretically it does not preclude a system much more centralized than the existing one. The only formal requirement is that at least one provincial or regional authority have more jurisdiction than the others. In theory, too, the special status need not be confined to Quebec. It could apply, for example, to both Quebec and Ontario because they are the largest provinces, or to Ontario, Alberta, and British Columbia because they are the richest provinces, or to the Atlantic provinces because they are the poorest, or to Newfoundland because it is geographically isolated and has a claim to certain special historic rights.[11] In practice, however, the argument in support of special status has been legitimized on grounds of linguistic and cultural differences, and these distinctions have been considered to apply in sufficient degree only to Quebec. In what follows, therefore, Option B has been taken to mean special status for Quebec alone and to imply for that province a significantly greater measure of decentralization than currently exists.

In purely domestic terms Option B appears to raise three basic questions:

- *Would special status be unjust?* That is, would it lead to constitutionally induced, but nonetheless morally unacceptable, inequities in the treatment of citizens from different parts of the country by their respective provincial or regional governments?
- *Would it sell?* That is, would the conferring of special powers on the Government of Quebec, whether or not it actually produced just results, be acceptable politically to the rest of Canada?
- *Would it intoxicate the beneficiaries?* That is, by conceding the legitimacy of the cultural-linguistic argument and by whetting the appetites of Québécois, would it set in motion an irreversible train of thought and a matching array of political forces that would ultimately lead to the separation of Quebec from Canada?

Answers to these fundamental problems may become more evident from the studies of domestic policy issues appearing elsewhere in this collection.

If one takes the point of view of foreign policy, however, and assumes a benignly disinterested international community, the basic issues posed by Option B appear similar in principle to those raised by Option A. Because a smaller portion of the total store of national resources would be affected, and because consultation and co-ordination might be more easily arranged with one provincial government than with ten, the difficulties of the system could even be substantively less significant and procedurally more manageable than those associated with Option A. Depending on the nature of the issues subject to the special status arrangements, Option B might also seem less confusing to the representatives of foreign governments. In time these representatives might be more easily educated to comprehend and accept the idea of Quebec as a special political entity than they could the far more daunting notion that in foreign affairs Canada speaks, not with one voice, but eleven.

Because Option B assumes Canada's survival as an integrated and sovereign power, the same sorts of legal and procedural mechanisms between the two levels of government for co-ordinating foreign policy would still be required. If, however, greater policy latitude were given to Quebec as a special status province, it seems probable that the legal devices would be emphasized at the expense of the procedural ones, at least with respect to the policy fields affected. In other words, the devolution of policy-making authority in particular foreign policy fields might somewhat reduce the requirement for day-to-day consultation in the policy process. (In substantive terms, fewer of the decisions would be Ottawa's business.) At the same time there might be an increased need for umbrella agreements to give Quebec the necessary legal cover abroad. Assuming amity, trust, and integrity of purpose on the part of both the federal and provincial authorities, and assuming also that the government in Quebec did not attempt to expand its turf by 'stretching' the agreed interpretation of the new jurisdictional rules, it is conceivable that the arrangement under Option B would work more smoothly than either the present system or a variant under Option A. In theory, certainly, Option B would diminish the number of potential friction points in specified policy areas since Ottawa would simply have abandoned the field.

Many of the disadvantages of Option A also apply to Option B, although in the second instance their distribution would probably be more uneven. In the case, for example, of negotiations that fell under the special status arrangements and that were of interest only to Quebec,[12] the policy process would not be delayed by the need for federal-provincial consultation, and the flexibility and credibility of 'Canadian' negotiators (suitably covered by legal instruments) would presumably not be affected.[13] In special status areas in which other parts of Canada also had an interest, however, the potential disadvantages would be greatly compounded since the international community might find itself confronting a potentially quarrelsome 'Canadian' delegation that included a federal authority, a clearly defined Québécois subdivision with substantial powers, and perhaps a collection of other provincial government representatives as well. The havoc created by this sort of situation could lead to despair and protest abroad; it could also work to the disadvantage of *all* the 'Canadian' bargainers. Experience might quickly instruct the various Canadian governments of the wisdom of working out their internal disagreements well in advance of their appearance in diplomatic public. But it seems clear that in fields of interest not entirely confined to Quebec, special status arrangements could have seriously disruptive results for the effective pursuit of Canadian interests abroad.

Similarly the problem of maintaining effective processes of public accountability would remain and might be intensified in those areas that were not visibly of interest to Quebec alone; so, also, would the complications arising generally for the conduct of 'national' policy in the affected fields.

These considerations suggest that from the foreign policy point of view, the special status option offers the greatest promise in fields that can be identified with interests peculiar to the Province of Quebec. In other areas it could hamstring the policy community at home, debilitate its negotiators abroad, and both at home and abroad substantially increase, rather than diminish, the intensity and frequency of federal-provincial conflict.

This prospect, in turn, raises the question of whether it is possible to identify specific fields of 'foreign policy' that are exclusively or primarily of interest to Quebec. Politico-security problems, for example, would seem not to meet the test. Certainly defence policy does not. The most obvious possibilities are those arising in fields that bear on social and cultural affairs: fields, that is, that provide Quebec with the distinctive characteristics on which the rationale for special status is ultimately founded.[14] These are precisely the fields in which the Quebec government has been particularly active since the early 1960s, and the existing umbrella agreements are, for that reason, concerned primarily with educational, cultural, technical, and scientific affairs in the context of *la francophonie*. The apparent success of these arrangements[15] may suggest, however, that the effective defence of the Quebec interests involved can be satisfactorily accomplished under existing arrangements or arrangements modified under Option A, and that special status is not really required. Even Quebec's interest in the encouragement and processing of francophone immigration is being smoothly accommodated under the present system.[16]

The 'foreign policy' argument for special status might be strengthened, however, if Quebec's claim to a unique socio-cultural interest were buttressed by arguments from economics. It could be held, for example, that culture is a camp-follower of commerce, and that if Quebec is to enrich its heritage and make its own mark on the francophone world, it must be free to influence the movement of goods and services and the flow of investment. But even here the authorities in Quebec City are at liberty now to engage in any promotional activities for their province that they think appropriate,[17] and it is difficult to see how they could be given the power to do more without depriving the federal government of the basic instruments of macroeconomic policy.

It can be argued that there is, perhaps, one area of foreign policy in which the socio-cultural and economic aspects of statecraft come together, and in which Quebec could be given special powers without causing these other difficulties. This area consists of the administration of international development assistance to francophone countries. Again, this is not really so much a matter of the Constitution as of public policy. The Quebec government is already involved in modest development-assistance programs of its own,[18] and even within the present framework, it is open to the federal authorities to delegate administrative powers in the foreign aid field to provincial governments as they already do to certain nongovernmental organizations. In principle, however, there is nothing to prevent the assignment of such powers to Quebec from becoming a matter of constitutional right. To the extent that this change removed the policy from the field of federal discretion, it would give the arrangement a comforting measure of security from Quebec's point of view. It would also provide a guaranteed flow of federal funds into the provincial 'foreign aid' budget, which suffers at present from being inadequately financed. The Quebec authorities could then design and administer the program in a manner consistent with their own priorities and resources, and in a way that would promote their cultural, educational, economic, and other interests. In short the arrangement would give them an opportunity to maintain a significant presence abroad in precisely the areas where they have the most distinctive interests. This presence, in turn, would presumably help to expand the international horizons of Québécois.

It is probable, of course, that the federal government would resist this sort of proposal quite vigorously. Foreign aid depends in part on humanitarian considerations, but it is also an instrument of foreign policy, and the federal authorities are unlikely to welcome a further weakening of their already limited diplomatic arsenal. An examination of the history of Canada's development-assistance effort would show that the francophone portion of the program has been that most directly linked to immediately visible political objectives. Its purpose has been partly to provide francophone Canadians with a sense of involvement in the projection of Canada abroad, and this objective would still be served — perhaps better served — under a decentralized system. But the program has also been aimed at cross-pressuring any other francophone powers that might be tempted from time to time to give a measure of *de facto* diplomatic recognition to Quebec as an independent power in world affairs. In effect Ottawa, with its substantially greater resources, has been trying to create in such countries a significant 'stake' in the survival of Canada's constitutional unity while seeking to dilute the influence of France, which would otherwise enjoy the enviable position of a near-monopoly donor. Quite apart, therefore, from the threat that an expansion of Quebec's role in foreign aid programs would pose to the domains of federal bureaucratic fiefdoms, officials in Ottawa could be expected to fear the loss of the bargaining leverage it would bring about in the event of future contests with foreign powers sympathetic to the aspirations of the more radically nationalist element in Quebec. For federal officials, in short, to give Quebec this kind of expanded power would seem at best a calculated risk.

This particular federal anxiety draws attention to the underlying assumption of both Options A and B that the objectives of a reasonably stable majority of Québécois are ultimately limited and therefore satiable. If this assumption is removed, and if it is further postulated that at least some members of the international community might be willing to give active diplomatic or other forms of support to an independence drive within Quebec,[19] it can then be argued that a greater measure of decentralization would serve to increase Quebec's opportunities for taking independent 'foreign policy' initiatives and for creating protocol incidents that could be interpreted as precedents in a gradual progress towards its achievement of international sovereign status.[20] As the disputes of the late 1960s clearly suggest, this possibility is a danger from the federal point of view even under the present system. The risk might well be aggravated by a special status constitution that would not only widen the area of potential jurisdictional 'aggression', but also concede the validity of the fundamentally significant premise that ethnic, linguistic, and cultural differences legitimize a special allocation of sovereign power. Once this concession is made, it can lead by logical extension to the notion that only a full measure of sovereignty will suffice, and that all arrangements short of complete constitutional independence inevitably threaten or compromise the ethno-cultural interest. The concession may thus seriously weaken the 'functional' argument in defence of the federal system. Whether this should be regarded in practice as a decisive consideration is a matter for long-term political judgement.

The reaction abroad to a movement in favour of Option B would probably be much the same as that to a movement in favour of Option A since either movement would be viewed as an essentially domestic constitutional adjustment. Some countries — for example, Belgium — would doubtless be curious about the details of the system and its practical implications. There might also be a degree of alarm in Africa and elsewhere at the prospect of ambitious minorities closer to home using the Canadian experiment as a precedent. There might, too, be some confusion in a variety of international contexts over the *locus* of final authority within Canadian delegations to conferences. For the reasons discussed earlier, however, this difficulty might be more readily overcome in the circumstance of special status for Quebec than in that of a further decentralization of foreign policy powers among all the provinces. In general, therefore, the international reaction could be expected to range from the faintly curious to the benignly indifferent.

At the same time it also seems probable that the substance of Canada's relations with at least a few members of the international community would be moderately affected. The Americans, for example, might find their bargaining position in some areas marginally improved along the lines discussed under Option A. More noticeably, perhaps, the countries of *la francophonie* would find themselves dealing more exclusively than they do now with Quebec's government, a circumstance they would presumably regard as more or less attractive depending on the impact of the arrangement on the flow of development assistance. Ottawa, in turn, could once again be expected to concentrate its own bilateral foreign aid initiatives in the traditional Commonwealth areas. It might also shift its own cultural, scientific, and educational exchange programs in the direction of non-francophone countries on the understanding that the francophone field would be taken over by Quebec. Depending on the exact terms of the devolution, 'Canadian' policies in particular fields — for example, the exploitation of international satellite-communications systems or even such controversial questions as the sale of uranium — might also be affected, and this could be of particular interest to Western Europe. Assuming, however, that the federal government retained control of the basic instruments of macro-economic policy, as well as responsibility for the politico-security aspects of Canada's external affairs, a special status arrangement could be expected to have a relatively limited impact on the international community at large. Like Option A, Option B is thus more interesting for its domestic than for its international implications.

Option C: Sovereignty for Quebec

From the international point of view, Option C (sovereignty for Quebec) and Option D (sovereignty for Quebec and formal association with Canada) differ very substantially from Options A and B in that the former pair would lead to the creation of two new international 'personalities' where previously there had been only one.[21] The focus of analysis must therefore shift from the question of how foreign policy decisions would be made and implemented in the context of variations on Canada's existing constitutional framework to the questions of how the international positions of Quebec and Canada-without-Quebec would be affected, and what direction their *policies* would take following Quebec's acquisition of fully sovereign status. Economic issues aside, it is not clear that the conclusion of an agreement of sovereignty-association would have a very significant impact on foreign policy. On the other hand, the general political atmosphere within which Quebec's constitutional independence was actually achieved and the degree to which its claims were subsequently contested by Ottawa could very well be centrally important factors. It will be assumed here that the transition, while painful, has been conducted in a manner recognized by both parties as constitutionally legitimate, and that it has not been accompanied by military or para-military violence. In these circumstances much of what is said about Option C would apply as well to Option D.

Turning first to Quebec, it seems obvious that the decision makers for the new state's foreign policy would quickly encounter some very clearly defined constraints on its freedom of action in world affairs. These would include, in particular, Quebec's geo-political location in North America and its consequent dependence on the continuation after partition of healthy patterns of economic and financial exchange with the United States, as well as with what would remain of 'Canada'.

There is little doubt that the relatively limited dimensions of Quebec's own internal sources of national power abroad,[22] and the existing way of life and expectations of its domestic constituency would be basic determinants of its foreign policies. It would be essential for Quebec to avoid any initiative that would risk causing hostility or alarm in governmental, industrial, or financial circles in the United States. It would also be important for Quebec to maintain as conciliatory a relationship with 'Canada' as possible, if only to minimize the very serious possibility of vengeful Canadian reactions to the original separation decision.[23]

The outcome of these considerations would be most readily evident in the fields of defence and security and in economic affairs, none of which are examined in detail in this paper.[24] In broad outline, it is apparent that the need to maintain friendly relations with the Americans would preclude alignment with members of the Soviet or Chinese worlds, even in the unlikely event that such a stance seemed an attractive option within Quebec itself; the same need would also rule out any policy of neutralism that would involve denial of Quebec airspace to North American defence forces. An independent Quebec would be far more likely to adopt a strategy of maintaining co-operative defence arrangements with both Canada and the United States; these arrangements could be expressed, among other means, by formal membership in NORAD and perhaps also in NATO.[25] It is probable, on the other hand, that the new state would keep its military contribution at a relatively low level, for it is obvious to everyone concerned that Quebec's forces could have, at most, a symbolic significance in East-West military affairs, and that Quebec's territory, like all of Canada, will be protected by the United States whether Quebecers or Canadians like it or not. When soldiers are used to buy diplomatic credit rather than to meet real security needs, the temptation is to provide them in minimal numbers and to rejoice in the luxury of the 'free ride'. The result of such a tactic would be a military establishment designed essentially to maintain territorial sovereignty and provide aid-to-the-civil-power. The Americans, provided that their own continental defence were not obstructed, could be expected to respond with no more than token expressions of disappointment.

In economic matters, too, the new Quebec régime would have to take into account its need to maintain confidence abroad, particularly in the United States. Ultimately, this requirement could be expected to have a conservative impact on its social and fiscal policies, as well as on official attitudes towards foreign capital and the general regulation of private enterprise.

Aside from these basic areas of public policy, a newly independent Quebec could be expected to exercise a particularly distinctive role in its relationships with other francophone countries since this is where the cultural and linguistic foundations of the independence movement would find their most obvious external expression. Such a development would be especially noticeable in relation to educational, cultural, scientific, and technological issues, where Quebec's involvement even now is very substantial. While the arrival of the new state would doubtless be welcomed by the Government of France, it is not inconceivable that over time rivalry would develop between the two powers in their Third-World relationships. Such difficulties might easily arise, for example, if the somewhat romantic view of Quebec that has been evident in France in recent years, but that now seems to be subsiding, were replaced in the post-separation period by France's more traditional posture of cultural arrogance and condescension. This development might be encouraged by the fact that, once Quebec's independence had been fully achieved, its usefulness as an instrument for causing discomfort among the 'Anglo-Saxons', already devalued by the death of de Gaulle, would be finally destroyed, and its heart-warming status as a hapless victim of anglophone oppression dissipated. It is possible, too, that developing countries in *la francophonie* would be tempted to possess themselves of diplomatic leverage by playing the two governments off, each against the other. On balance, however, the impact of this sort of development would almost certainly be marginal and, in any event, it would not be of significant interest to countries outside the francophone world.

A more serious consequence from the point of view of *la francophonie* might be the effect of the partition on the total flow of Canada-Quebec development assistance. Under present circumstances the federal government has a significant incentive for assigning considerable portions of Canadian foreign aid to the francophone sector of the Third and Fourth Worlds. Even with the special arrangement envisaged as a possibility under Option B, Ottawa would be required to supply Quebec with substantial resources allocated to precisely this purpose. In the post-separation period, however, it is almost certain that the francophone portion of the Canadian aid program would be brought to an end if only because its continuation would be politically unacceptable at home.[26] Quebec would therefore have to assume full financial responsibility for bilateral disbursements in the francophone world. It seems improbable, however, that it would be able to allocate for this purpose resources comparable to those previously available from Ottawa. This could be a particularly serious problem in the early years of the new régime when the economy might be suffering from severe transitional dislocations, and when domestic expectations for expensive public policy initiatives at home might well be euphorically high. The potential recipients of Quebec's assistance would doubtless accept for a time the argument that delays were unavoidable during so dramatic a period of adjustment, but eventually the pressures on the new régime to offer substantial amounts of development aid would almost certainly intensify. To the extent that Quebec failed to respond, its popularity would fade.

Difficulties with *la francophonie* could also arise in the field of immigration, although this development is not as easy to predict.[27] It is probable that the new government would take a special interest in immigration from French-speaking communities. Certainly such action would be consistent with that government's cultural objectives, however worrisome it might be to the English-speaking minority within its own constituency. It is not inconceivable, however, that a policy of this sort would produce a particularly large number of applications from the poorer countries of the francophone world, leading in turn to the adoption of a relatively restrictive policy on admissions. Resentments might very well result, especially if the restrictions were administered in a way that aggravated the 'brain-drain' from the Third World, or produced the practical effect of discrimination among applicants along racial lines. This problem would by no means be peculiar to Quebec, but if it gave rise to charges of implicit racism, the fact that the new state had been legitimized primarily on linguistic and cultural grounds might make the charges even more difficult to evade or refute. It could not, in short, be assumed that Quebec's relationships with the rest of the French-speaking world would be entirely free of tension.

The new state's relations with other members of the international community could be expected to be essentially uncontroversial. They would reflect Quebec's basic politico-security alignment with the West, its geographical location under the continental defence umbrella of the United States, and its general characteristics as a *status quo* power with modest ambitions, limited resources, and an unblemished historical past. The régime would certainly seek full membership in the United Nations and any other international bodies that it considered useful and appropriate.[28] If its sovereign status were not being contested in principle by Ottawa, its admission to each international organization would probably be secured without the inconvenience of serious opposition. In sum an independent Quebec would be received by the world at large as an inoffensive and, in global terms, not very substantial, offspring of the Western bloc.

This over-all characterization calls attention again to the fact that in many areas, including most of the 'functional' ones, the ultimate bargaining power of the new régime would be relatively limited. Quebec would no longer suffer at home from the disadvantage of having to filter through the federal policy-making process the pursuit of its interests abroad. On the other hand, the practical weight of its international interventions would not be amplified, as before, through their espousal by an experienced middle power. This might lead Quebec's government to be particularly distrustful of bilateral mechanisms for dealing with foreign countries and encourage it to follow Canada's own post-war strategy of supporting the resort to multilateral forums for international problem solving. With the exception of the principal Western security organizations, however, these multilateral forums tend to be dominated by coalitions of Third- and Fourth-World powers with which the new régime would have relatively little in common. In many important fields — for example, the pursuit of secure supplies of petroleum resources or the conduct of international trade negotiations — this situation might lead Quebec's government to attempt to increase its influence by acting politically and diplomatically in concert with Canada and the United States. It is not inconceivable that the advantages of having Canadian and American support in such dealings overseas would to some extent inhibit Quebec's bargaining with its neighbours at home.[29] Taken together with the compromises in domestic policy that would arise from the need to accommodate American capital and security interests, the situation might also create a measure of dissatisfaction among nationalist Québécois in the domestic constituency. The balancing of such internal and external pressures might be one of the more difficult of the political challenges that would confront the new régime.

For the development of all these international relationships, of course, it would be necessary for Quebec's government to create its own professional foreign service, but this does not appear to be a particularly intimidating prospect. The basic machinery is to some extent already in place in the form of the Department of Intergovernmental Affairs and the various Quebec Delegations-General abroad.[30] It is also possible that francophone diplomats could be attracted from the present Department of External Affairs.[31] In any case the demand would be relatively limited in the sense that the régime would require independent missions in only a handful of capitals and could administer its other relationships through multiple accreditations, special arrangements with the diplomatic services of other foreign powers, personnel assigned to multilateral organizations, and other such devices. The reciprocal representation of foreign powers in Quebec City would lead to the development there of a small diplomatic corps, although it seems probable that most countries would seek double-duty arrangements through their existing missions in Ottawa,[32] Washington, or New York.

For 'Canada' the loss of Quebec to independent sovereign status would probably not have fundamental significance for the general direction of foreign policy decisions, particularly if the transition to the new arrangement were negotiated by processes acceptable to both sides and, therefore, to the international community at large. The country's fundamental strategic interests and, in most respects, its economic interests would remain the same as before, and to that extent basic shifts in policy would be unlikely. On the other hand, Canadian diplomats would probably experience a perceptible decline in their influence in certain areas, including those concerned with the politics of security. This decline would result partly from the fact that Quebec's departure would represent a reduction in the store of real national assets, including military forces, under ultimate federal control and partly from the spectacle of the partition process itself. This spectacle would provide foreign governments with a highly visible bench-mark on which to base Canada's demotion in the international hierarchy. To some degree this is an intangible matter of socio-psychological perception, and it is difficult to estimate its effects in concrete terms. Nonetheless, it seems highly probable that Quebec's separation would be taken abroad as a signal of Canadian weakness or failure even if the comparative civility of the atmosphere within which it was accomplished were admired overseas. The problem would not be evident in every field — the country's position as a grain producer, for example, would be unaffected — and in a few cases there might be gains in bargaining leverage. Unless, for example, 'Canada' undertook an obligation to continue the arrangements currently in place or projected for supplying Quebec with Albertan oil, Ottawa might discover that it had, at least for a time, a greater measure of 'export room' in the petroleum area. To some extent, too, the damage might be limited by arrangements for acting in concert with Quebec in international negotiations. Over all, however, there seems to be little doubt that Canada would lose status abroad as a protagonist in world affairs, and that this would diminish its credibility in such multilateral contexts as the United Nations and the North Atlantic alliance.

Ottawa might also lose some bargaining power with the United States, particularly in areas in which the Americans were able to exploit competing interests of Canadians and Québécois, or where they were in a position to take tactical advantage of the desire of both powers to develop and maintain independent diplomatic and political credibility in Washington. On the other hand, awareness of this very danger might give both Ottawa and Quebec City an overriding incentive to form diplomatic alliances in dealing with their much more powerful neighbour.[33] Perhaps the safest conclusion is that *all* of these patterns would be evident, both simultaneously and consecutively, depending on issue and context.

Economic adjustments aside, the one area in which significant changes would probably occur would be in relation to *la francophonie*. In spite of the substantial francophone communities in New Brunswick, Ontario, and some other provinces, the departure of Quebec would effectively remove the principal reason for Canada's presence in francophone Africa as a source of development assistance, and it is conceivable that the continuation of such programs would arouse the active hostility of the anglophone Canadian population. It is possible that this reaction would be accompanied by a renewed emphasis on the Commonwealth connection, although this is more difficult to determine. It is also conceivable, but by no means certain, that there would be a resurgence in Canada of English-Canadian nationalism; this could affect cultural policy abroad, particularly in relation to the United States. The Quebec nationalist argument that Quebec's separation would be liberating for

English Canada as well as for Québécois is based on the notion that Canadian cultural policy would no longer have to suffer from the diluting inhibitions hitherto forced on it by the need to accommodate two nationalities. On the other hand, it also seems possible that the existing network of functional north-south linkages would be greatly strengthened by the division of the country if only because of the damage it would do to the political psychology that results from the maintenance of a single polity "from sea to sea." It can be argued, as well, that the cultural differences that now exist between Canada and the United States are precisely the result of the duality to which nationalists in Quebec are so strongly opposed. How these conflicting forces would affect the eventual status of Canada and Quebec, and to what extent they would be influenced by the more general geo-political considerations of statecraft, it is impossible to predict.

Option D: Sovereignty-Association for Quebec

Economic issues aside, it is not clear that Option D, that is, sovereignty-association, would have international or foreign policy implications significantly different from those entailed by Option C. Option D can therefore be considered quite briefly. Since sovereignty-association would make the break with Canada appear less 'clean' and open it up to greater ambiguities of interpretation, it might pose a slightly more puzzling problem for foreign powers during the transitional phase when international recognition of Quebec's new status was being pursued. This would be a temporary difficulty at most, however, and it is even possible that the situation would work the other way: that is, to the extent that formal association with Canada would demonstrate Ottawa's acceptance of Quebec's decision for independence, it could help to lessen the delicacy of the situation from the viewpoint of foreign powers by making it easier for them to recognize Quebec

From the tactical point of view, on the other hand, an association agreement might have considerable significance for foreign policy if only because it would indicate that Canada and Quebec intended to concert their positions on many foreign policy issues and perhaps maintain an integrated defence establishment. Both countries might thereby rescue some of the bargaining power that each of them would otherwise have lost as a result of their separation. They would be in a better position, in particular, to deal with the 'divide-and-rule' tactics that might become tempting to Washington. They might also be able to economize on representational facilities and personnel.[34] To the extent that they were able to hold substantive policy positions in common, there might be circumstances in which the separation actually served in a marginal way to increase their combined power; for example they would now exercise two votes instead of one in multilateral international organizations. Since this sort of co-operation might disappoint the more ardent of Quebec's nationalists, as well as the more resentful of the divorced Canadians, both governments might find it difficult for domestic political reasons to carry the policy very far, particularly in highly visible situations and especially at the beginning. In time, however, the pattern of co-operation, once successfully initiated, would probably grow.

All this assumes, of course, that Quebec's acquisition of sovereignty has been achieved by more or less amicable means, and that no deep-seated residue of bitterness and hostility remains in anglophone Canada. From the point of view of practical self-interest, there may be little doubt that in the foreign policy field, as in others, the most sensible arrangement after separation would be the maintenance of closely co-operative working relationships. From the political point of view, however, the assumption that the 'Canadians' would be so moderately disposed in the wake of a separation agreement that they would accept such a relationship appears to be highly unrealistic, especially since many of the basic societal determinants of the 'brokerage style' in Canadian politics would have been undermined by the separation itself. A spirit of vengeful hostility might well follow the partition, and if it led to policies that had the effect of creating a reciprocal measure of ill will on Quebec's side, there would be a genuine possibility of these attitudes becoming permanently ingrained. The difficulties, moreover, could arise as much from policies *within* the two countries as from relations between them: for example, in reference to their respective treatments of English- and French-speaking minorities in the post-separation period. A foreign policy corresponding to sovereignty-association might, therefore, be easily executed; it would not be easily instituted.

Conclusions

It should be clear from the foregoing that in terms of foreign policy, each of the four options considered is viable, assuming appropriate circumstances of domestic politics. In other words, none of the constitutional possibilities envisaged in the project appears to pose a *conclusive* disadvantage in terms of foreign policy for either 'Canada' or Quebec, although the precise distribution of probable costs and benefits obviously varies marginally from one arrangement to the next, particularly if one moves from Option A or B to Option C or D. That the options are internationally workable is a reflection ultimately of Canada's relatively modest size and unusually secure geopolitical position. The international community must be regarded as benignly indifferent to the constitutional relationships between Canada and Quebec. Some of the members of that community — for example, the United States — may have preferences, but given the existing political and economic realities, which would act as constraints on Canada-Quebec policies abroad under *any* constitutional circumstance, other nations are unlikely to regard their own preferences as vital to their national interests. From the purely international point of view, therefore, Canadians — and Quebecers — are free to devise whatever constitutional arrangements they like. They should not assume, however, that devising the constitution they like will automatically allow them to choose the foreign policies they wish.

Notes

1. For a discussion of these and related concepts, see K.J. Holsti, *International Politics: A Framework for Analysis*, 2d ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1972), especially Chapters 4, 5, and 6.

2. The following paragraphs are adapted from Denis Stairs, "Devolution and Foreign Policy: Prospects and Possibilities," in *Options: Proceedings of the Conference on the Future of the Canadian Federation* (Toronto: University of Toronto Press, 1977), especially pp. 143–45. For the official Ottawa view, see the Honourable Paul Martin, *Federalism and International Relations* (Ottawa: Queen's Printer, 1968) and the Honourable Mitchell Sharp, *Federalism and International Conferences on Education: A Supplement to Federalism and International Relations* (Ottawa: Queen's Printer, 1968).

3. The 'textbook' example is provided by Canada's inability to ratify a number of internationally negotiated labour conventions. The country has avoided international censure partly because the record of other powers is also mixed, but more because provincial labour codes already meet or exceed international standards.

4. The Americans have a similar difficulty arising, not from the power of state governments, but from Congress's independence of the executive. There are occasions, of course, when inability to make firm commitments is tactically helpful for hard-pressed negotiators.

5. The weakness of the Foreign Investment Review Agency seems to be due in part to this factor.

6. Officials of the Commission of the European Community, for example, sometimes complain that negotiations with Canada over such matters as fisheries are inconveniently prolonged by Ottawa's need to consult with Newfoundland and other Atlantic provinces. (Brussels, confidential interviews, Autumn 1979.)

7. This results from the number and range of intergovernmental dealings with American authorities. Melancholy officials in the Department of External Affairs have been known to comment that on matters of Canadian-American relations, "The Ambassador in Washington is often the last to know."

8. It has been argued that one of Canada's bargaining advantages under current circumstances is that Ottawa is able to arrange its positions much more easily than Washington. See Gilbert R. Winham, "Choice and Strategy in Continental Relations," in W. Andrew Axline *et al.*, *Continental Community? Independence and Integration in North America* (Toronto: McClelland and Stewart, 1974).

9. This possibility is exemplified by the Clark government's commitment to give Newfoundland full ownership and control of the resources under its coastal waters.

10. This would not be entirely new. Such difficulties arose, for example, in some of the francophone conferences in Africa in the late 1960s when a number of African governments complained about the procedural harangues over the status of the Quebec delegation. (Ottawa, confidential interviews, 1972–1973.)

11. In relation, for example, to resources of the sea and the seabed.

12. As in the context of francophone cultural issues. Even here, however, it could be argued that New Brunswick and Ontario also have a substantial stake in the outcomes of pertinent negotiations.

13. There might, however, be spill-over effects in other policy areas as a result of the confused perceptions of other powers.

14. Acadians in New Brunswick might wish, of course, to challenge the exclusivity of this claim.

15. It should be understood, however, that at least some officials in Ottawa are convinced that even the existing umbrella agreements have given the Quebec authorities too much latitude. They would like to see these agreements more restrictively defined. (Confidential interviews.)

16. Paris, confidential interviews, November 1979. There is a problem, of course, in that once immigrants are admitted to Quebec, there is nothing to prevent them from moving to other parts of Canada.

17. For a brief account, see Louis Sabourin, "Quebec's International Activity Rests on Idea of Competence," *International Perspectives* (March/April 1977), pp. 3–7.

18. These are primarily in educational and related fields. Details can be obtained from the annual reports of the Ministry of Intergovernmental Affairs. The activities involved are not usually identified as 'development assistance'. (Variations on the term 'co-operation' seem to be preferred.) But the flavour is made very explicit in the Quebec government's white paper on sovereignty-association. See Québec, Conseil exécutif, *Québec-Canada: A New Deal* (Quebec: Éditeur Officiel, 1979), p. 96.

19. France is the obvious possibility, although its present official posture is to treat the matter as a domestic issue.

20. Thereby following a pattern earlier established by Canada itself. See R. MacGregor Dawson, *The Development of Dominion Status, 1900–1936* (London: Oxford University Press, 1937).

21 This assumes, of course, that the balance of 'Canada' has remained united. It is conceivable that the country would balkanize.

22. As measured by population, gross national product, standing armed forces, and the like.

23. The Parti québécois has always assumed that such reactions could be contained. This could well be a fundamental miscalculation.

24. For my own views, such as they are, see Stairs, "Devolution and Foreign Policy," pp. 123–34.

25. This is made explicit in Québec, Conseil exécutif, pp. 56–57, 95–96. The references to NATO, however, are slightly ambiguous, and there is some indication that the régime might regard its involvement in NORAD as sufficient practical fulfilment of its NATO commitments. The association of NORAD with NATO is an old Canadian custom usually overlooked by other NATO allies.

26. Ottawa might in any case encounter a practical difficulty in that it would have lost its principal source of francophone technical assistance personnel.

27. The white paper on sovereignty-association deals with such questions as citizenship and arrangements for the movement of labour, but makes no mention of immigration policy.

28. See Québec, Conseil exécutif, pp. 56–57.

29. This would depend to some extent on the degree to which issues were 'linked' during the course of negotiation, but, even without explicit linkages, the Quebec government would presumably be interested in maintaining a warm climate of diplomatic credit in Washington.

30. See Sabourin, "Quebec's International Activity . . ."

31. These diplomats might be encouraged to make the move in part by changes in 'Canadian' attitudes towards francophone public servants in general. Talent might also be available from other foreign service departments, for example, Industry, Trade and Commerce.

32. That is, assuming that this arrangement would not be diplomatically awkward.

33. The possible effects of changes in the structure of the North American state system are considered briefly in Daniel LaTouche, "Quebec and the North American Subsystem: One Possible Scenario," *International Organization* 28 (Autumn 1974): 955–59.

34. The white paper on sovereignty-association notes that it "does not exclude the possibility that . . . Québec . . . may share with Canada some of its responsibilities toward foreign countries." Québec, Conseil exécutif, p. 95.

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Les affaires extérieures : la perspective juridique

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Les affaires extérieures : la perspective juridique

Introduction

Avant de chercher à dégager, dans le domaine des affaires extérieures, les implications juridiques des quatre options constitutionnelles que nous connaissons, il importe d'abord de bien se situer par rapport au droit existant, tant au plan constitutionnel qu'international. Les éléments essentiels à envisager, de ce point de vue, sont le statut international du Canada, la répartition des pouvoirs extérieurs en droit interne canadien ainsi que le statut international des provinces.

Au regard du droit international, le Canada, depuis l'adoption du Statut de Westminster en 1931, constitue un État souverain doté de la pleine personnalité internationale, juridiquement égal aux autres États souverains et responsable, vis-à-vis la communauté internationale, pour tous les actes contraires au droit international commis sur son territoire[1]. De ce point de vue, il ne peut en aucune façon se réfugier derrière sa constitution fédérale pour échapper aux obligations qui lui incombent en vertu du droit coutumier international ou de traités en vigueur[2]. S'il est incapable, pour des motifs de compétence interne, de s'engager dans un domaine donné, il doit ou bien s'abstenir ou bien négocier un traitement particulier dont le contenu sera explicité dans une clause typique dite *clause fédérale*. De fait, le Canada, à plusieurs reprises dans le passé, a dû avoir recours à de tels expédients. Encore tout récemment, dans les derniers accords rattachés à l'Accord général sur les tarifs douaniers et le commerce (GATT), il préférait s'abstenir de tout engagement en ce qui concerne les politiques d'achat des provinces et obtenait, pour ce qui est du Code sur les obstacles techniques au commerce, que son engagement se limite à prendre toutes les mesures raisonnables en son pouvoir pour assurer le respect de celui-ci par les provinces. Ainsi donc, nonobstant son statut d'État souverain en droit international, le Canada apparaît à certains égards handicapé dans la conduite de ses relations extérieures, et les États étrangers se voient contraints d'une certaine façon d'en tenir compte.

Dans de telles conditions, il est presque inévitable que la reconnaissance d'une personnalité internationale restreinte au profit des provinces soit perçue comme une solution possible à des problèmes précis. Le droit international, nonobstant ce que certains constitutionnalistes canadiens ont pu affirmer[3], n'a pas d'objection fondamentale à ce type de solution. Mais ainsi qu'il est apparu lors des discussions qui ont entouré la rédaction de l'article 6 de la *Convention de Vienne sur le droit des traités*, le fondement premier de cette personnalité internationale restreinte ne peut résider ailleurs que dans la constitution interne de l'État concerné. Au point de départ, donc, seul l'État souverain qu'est le Canada peut être considéré comme sujet de droit international; les provinces, pour leur part, peuvent être acceptées comme des sujets dérivés de droit international dans la mesure où la constitution du Canada le permet, et où les autres États souverains consentent à traiter avec ces dernières[4].

Mais que dit la constitution du Canada sur le partage des compétences dans le domaine des affaires extérieures[5]? La seule disposition de l'Acte de l'Amérique du Nord britannique 1867 qui porte explicitement sur le sujet est devenue caduque en 1931 : elle octroyait tout simplement au Parlement fédéral le pouvoir de mettre en œuvre au Canada les traités de l'Empire. Depuis, la théorie, la jurisprudence et la pratique constitutionnelles sont venues préciser les données fondamentales du partage des compétences dans ce domaine. S'agissant d'abord du *treaty-making power*, l'opinion la plus répandue veut que l'exécutif fédéral, à titre d'héritier de la prérogative royale en matière de relations extérieures, soit le détenteur unique du pouvoir de conclure des traités avec l'étranger. Bien que ce point de vue ait parfois été contesté, particulièrement chez les auteurs québécois, et bien que la question n'ait jamais été résolue judiciairement, la prépondérance quasi absolue du pouvoir central, à l'heure actuelle, apparaît en pratique difficilement contestable, au moins au niveau des contacts officiels entre les États. Au niveau des échanges informels ou des relations transnationales, si l'on préfère, les provinces, en revanche, ont eu tendance à multiplier les contacts avec diverses institutions dans plusieurs pays de telle sorte qu'à l'heure actuelle, un vaste réseau de relations s'est tissé entre celles-ci et l'étranger[6]. S'agissant d'autre part de la mise en œuvre des traités du Canada au plan interne, la jurisprudence a clairement établi que celle-ci relevait du point de vue législatif de l'autorité compétente suivant l'objet du traité. Dès que le gouvernement canadien s'engage vis-à-vis un autre État dans un domaine qui ne relève pas de la compétence législative du Parlement fédéral, il s'expose à de sérieux problèmes, à moins évidemment qu'une clause fédérale n'ait été insérée dans l'accord en question ou qu'il ne se soit assuré à l'avance la collaboration des provinces. Nonobstant les nombreuses critiques formulées à l'endroit d'un tel partage des compétences en matière d'affaires extérieures et certaines allusions de la part du juge en chef Laskin à l'effet qu'un nouvel examen de la position de principe de la jurisprudence dans ce domaine pourrait être justifié, cette dichotomie fondamentale décrit parfaitement l'état actuel du droit au Canada.

Compte tenu de l'attitude du droit international vis-à-vis les États fédéraux en général et compte tenu des règles de droit constitutionnel décrites précédemment, les provinces canadiennes peuvent-elles prétendre à un quelconque statut international à l'heure actuelle? La réponse à cette question, en principe, relève de la pratique internationale. Or, cette pratique n'est pas très claire dans la mesure où elle est interprétée différemment par le gouvernement fédéral et par les provinces, particulièrement le Québec. En effet, s'il est vrai que cette dernière province a effectivement conclu des « ententes » culturelles avec la France en 1964 et 1965, sous le parapluie d'un accord France-Canada, et a été admise, à titre de « gouvernement participant », à l'Agence de coopération culturelle et technique, qui regroupe la plupart des États francophones, il faut ajouter qu'une interprétation diamétralement opposée de la signification de ces faits a été proposée dans deux livres blancs, l'un fédéral, l'autre québécois. À part la France, cette controverse paraît surtout avoir agacé les pays étrangers impliqués qui, bien que réceptifs à une solution de droit international, ne veulent en aucune façon intervenir dans les affaires canadiennes. Finalement, avec l'élection du parti québécois à la tête du gouvernement du Québec en 1976, le débat a été largement relégué à l'arrière-plan, compte tenu du désir de ce parti de réaliser l'indépendance de la province[7].

Telles sont donc, dans les grandes lignes, les données essentielles qui décrivent le cadre juridique actuel dans lequel s'insère l'action internationale du Canada. Face aux quatre grandes options constitutionnelles que l'on connaît, soit le fédéralisme renouvelé, le statut particulier, la souveraineté-association et l'indépendance, il va de soi que ce cadre est appelé à être modifié. Mais le droit lui-même a certaines exigences qui font que les possibilités de modification ne sont pas infinies : au-delà de certaines limites, la règle de droit n'a tout simplement plus d'utilité. Il faut préciser, cependant, que le rôle du droit, de même que ses exigences, varie suivant le degré d'intégration politique de la société dans laquelle il s'insère. Au niveau de la société internationale, qui est encore relativement peu intégrée, la sécurité demeure la préoccupation première. Aussi est-ce surtout par rapport à des concepts fondamentaux comme ceux de souveraineté, de responsabilité et de consentement que seront appréciés, à ce niveau, les changements envisagés au Canada. À l'intérieur même des sociétés étatiques, en revanche, le droit vise d'abord et avant tout à l'efficacité. Les principales qualités de la règle de droit seront alors la précision, la cohérence et le réalisme, et c'est en fonction de ces qualités que seront jugées, au plan interne, les diverses solutions proposées.

Dans les pages qui suivent, nous allons envisager tour à tour chacune de ces options à la lumière de ces critères généraux de sécurité et d'efficacité, en suivant dans chaque cas un cheminement identique : la dimension interne des changements proposés sera d'abord envisagée; viendra ensuite l'examen de leur dimension externe. Dans le cas du fédéralisme renouvelé et du statut particulier, l'analyse portera essentiellement sur les conséquences d'une centralisation ou d'une décentralisation accrue des pouvoirs dans le domaine des affaires extérieures. Dans le cas de la souveraineté-association et de l'indépendance, c'est le processus même de désintégration qui retiendra davantage notre attention.

Le fédéralisme renouvelé

Dans l'optique d'un fédéralisme renouvelé, l'objectif primordial qui est poursuivi, de façon générale, est la révision de la constitution, non pas dans ses données essentielles, mais plutôt sur des points précis où des changements paraissent s'imposer à la lumière de l'expérience acquise. Or, le domaine des affaires extérieures est précisément un de ces secteurs d'activité qui semblent, de l'avis général, exiger certains changements. À la source de cette insatisfaction, on peut relever en particulier deux problèmes.

Le plus fréquemment mentionné, surtout chez les juristes et les politicologues anglophones[8], a trait à la distinction traditionnelle entre le pouvoir de conclure et le pouvoir de mettre en œuvre un traité : on considère que cette distinction n'a plus sa place de nos jours et contribue à affaiblir le Canada au plan international. On fait valoir également, toujours dans le même sens, que le Canada, seul responsable au plan international, doit être en mesure de respecter tous ses engagements s'il veut conserver la confiance de ses partenaires. L'idée que les provinces puissent agir au plan international est totalement rejeté, car le Canada ne doit s'exprimer qu'avec une seule voix à l'extérieur. Déjà, à cet égard, la multiplication des contacts informels entre les provinces et l'étranger, y compris dans certains cas la mise en place de véritables réseaux de délégations, est perçue comme un danger.

Pour certains[9], cependant, particulièrement chez les juristes et les politicologues québécois, mais aussi, à l'occasion, parmi leurs confrères des provinces de l'Ouest, le véritable problème réside davantage dans l'absence d'une compréhension réelle des données provinciales et régionales de la part des autorités centrales. Cette incompréhension, souligne-t-on, a contribué à fournir une image déformée du Canada à l'étranger, surtout en matière culturelle, et a parfois même desservi carrément les intérêts des provinces.

Entre ces deux positions opposées, certains,[10] persuadés de la nécessité d'une plus grande cohésion dans la formulation de la politique extérieure canadienne, reconnaissent que l'octroi au Parlement fédéral d'un pouvoir législatif absolu en matière de mise en vigueur des traités constituerait une menace très grave à l'autonomie des provinces. Pour eux, la seule solution possible est la mise en place de mécanismes efficaces de coordination, tout en conservant le *statu quo* en ce qui concerne le partage des compétences.

Pour l'essentiel, les changements envisagés dans le cadre d'un fédéralisme renouvelé tournent autour de trois hypothèses : un pouvoir fédéral complet en matière de conclusion et de mise en vigueur des traités; un pouvoir provincial partiel en matière de conclusion des traités, correspondant au champ de compétence des provinces; le *statu quo* en ce qui regarde le partage des compétences, mais avec des mécanismes plus élaborés en ce qui regarde la coordination. Il reste maintenant à envisager l'impact de ces changements au plan interne et au plan externe.

La perspective interne

L'hypothèse d'un pouvoir fédéral complet en matière de conclusion et de mise en vigueur des traités apparaît à première vue comme une solution simple et radicale au problème de la relative incapacité du Canada au plan international. Libéré de la crainte de s'engager dans un domaine hors de sa compétence, en effet, le gouvernement canadien serait nul doute plus en mesure d'élaborer des politiques qui répondent de façon globale aux préoccupations du Canada au plan international. Sa liberté de manœuvre dans des négociations complexes comme la Ronde Tokyo s'en trouverait élargie, tout comme serait accrue de façon positive sa capacité d'agir au sein d'organismes internationaux comme l'Organisation internationale du travail ou encore sa capacité de prendre des initiatives dans des domaines comme celui des relations culturelles. En ce qui regarde, par ailleurs, l'exécution de ses engagements internationaux, la situation juridique serait claire, et une véritable cohérence enfin serait réalisée.

Mais cette solution, théoriquement très efficace, est-elle réaliste? Dans une étude récente, Donald C. Story, tout en se prononçant en faveur de celle-ci, se voit contraint d'admettre qu'elle risque pour le moment d'être assez mal reçue. « *It is indeed the third possibility, total federal authority — interestingly the least politically palatable option to many Canadians at this time in our history — which presents the fewest complications and, most important, seems to hold the greatest promise for unity in the long run* »[11].

Il est difficile de voir comment le Québec, pour ne prendre que cette province, accepterait un changement qui irait à l'encontre de toutes ses prises de positions antérieures. Même pour les autres provinces et même à long terme, cette solution paraît douteuse. Il se peut, effectivement, qu'elle soit la plus favorable à une certaine conception de l'unité canadienne, mais elle peut aussi être considérée, dans une autre perspective, comme une menace à cette même unité. Ici comme dans bien d'autres domaines, le jugement de valeur varie en dernier ressort suivant le point de vue que l'on adopte et l'objectif ultime que l'on poursuit. Le mieux que l'on puisse dire, dans les circonstances, c'est que la solution envisagée, théoriquement efficace par rapport à un problème donné, soit celui de l'unité canadienne, ne l'est pas en pratique parce qu'elle ignore que cette même unité repose sur la diversité.

Aux yeux du Québec, du moins tel qu'il s'est exprimé de 1965 à 1975, la solution la plus réaliste, dans le contexte politique canadien, consisterait à reconnaître aux provinces le droit de conclure des accords internationaux dans leurs domaines de compétence propre[12]. Cette solution, tout comme la précédente, présente l'avantage de mettre en relation le pouvoir de conclure un traité et le pouvoir de l'exécuter : à cet égard, elle peut facilement être qualifiée de cohérente. Malheureusement, toujours au strict plan interne, elle souffre d'un double défaut. D'abord, elle est moins claire qu'il ne peut paraître à première vue. Fréquemment, en effet, il arrivera qu'une question abordée au plan international implique à la fois des aspects de compétence provinciale et des aspects de compétence fédérale. Qui alors, du fédéral ou des provinces, sera constitutionnellement responsable des négociations? La réponse à cette question n'est pas simple et, quelle que soit sa nature, risque de soulever des désaccords. Et, il n'est pas sûr qu'elle intéresse vraiment d'autres provinces que le Québec. Seul l'Ontario, jusqu'à date, a exprimé un souhait semblable, et, même là, l'exercice de cette compétence nouvelle dans le domaine des affaires extérieures est rendu sujet à l'approbation préalable des autorités centrales[13]. Au surplus, comme il est prévisible que certaines provinces seraient difficilement en mesure d'assumer adéquatement une telle responsabilité, il faudrait prévoir un mécanisme quelconque de délégation.

Dans ces conditions, il n'est pas surprenant de constater que la position commune de la plupart des projets de révision constitutionnelle est à l'effet qu'un *treaty-making power* provincial n'est pas nécessaire, une collaboration plus étroite entre les autorités fédérale et provinciales devant suffire à assurer une représentation plus réelle des particularismes provinciaux[14]. De façon générale, donc, ces projets suggèrent le *statu quo* en ce qui concerne la dichotomie entre le pouvoir de conclure et le pouvoir de mettre en œuvre un traité, mais créent à la charge du gouvernement fédéral une obligation de consultation préalable dans les domaines de compétence qui intéressent les provinces, et prévoient dans certains cas une ratification par une deuxième chambre de type fédéral. Dans cette même perspective, les accords informels à caractère administratif de la part des provinces, tels qu'ils se pratiquent actuellement, seraient officiellement reconnus de même que le droit des provinces à une représentation à l'extérieur, mais à condition que ces dernières agissent à l'intérieur des grandes lignes de la politique canadienne.

Toutefois, entre cette position et celle d'un Québec préoccupé par sa survie et désireux de faire connaître au reste du monde, mais particulièrement aux pays francophones, qu'il existe, la distance est manifestement assez grande. Dans ces circonstances, on en arrive à se demander si la recherche d'une solution uniforme, valable pour l'ensemble du Canada, qui soit en même temps claire, cohérente et réaliste, n'est pas une illusion. À cet égard, on serait tenté de conclure que le fédéralisme renouvelé n'offre, en ce qui concerne les relations extérieures, que des solutions de type *second best*. Mais peut-être ce genre de solutions, dans un contexte fédéral, est-il le seul possible au regard du droit international?

La perspective externe

Il va de soi que, si le Canada devait modifier sa constitution dans le sens d'une intégration plus complète des pouvoirs dans le domaine des affaires extérieures, les autres pays n'y verraient pas d'inconvénients. Au contraire, dans la mesure où ils n'auraient plus à envisager des arrangements spéciaux pour faciliter la participation du Canada à telle ou telle convention internationale, dans la mesure où ils n'auraient plus à redouter que le Canada n'utilise le prétexte de son partage des compétences au plan interne pour esquiver ses responsabilités au plan international, dans la mesure enfin où ils n'auraient plus à faire face à des « querelles de drapeaux » au sein d'organismes internationaux comme l'Agence de coopération culturelle et technique, les pays étrangers ne pourraient que s'en réjouir[15]. Pour ces derniers, en effet, toute solution simple qui élimine les incertitudes et les conflits inutiles est *a priori* souhaitable. Mais depuis longtemps déjà, ces pays savent également qu'au-delà des arrangements internes dans le domaine des affaires extérieures, c'est d'abord et avant tout le caractère fédéral d'un pays qui soulève, au plan international, des difficultés.

Par « caractère fédéral », il faut entendre cette réalité politique qui fait que, même si tous les pouvoirs dans le domaine des affaires extérieures sont dévolus, au sein d'un État fédératif, aux autorités centrales, dans certains cas, il demeure pratiquement impossible à celles-ci de s'impliquer dans un domaine ou un autre sans l'assentiment des gouvernements décentralisés, ou à tout le moins de représentants désignés des régions. L'expérience des États-Unis et de l'Australie, deux États fédéraux où les autorités centrales sont dotées de pouvoirs absolues en matière d'affaires extérieures, paraît très significative à cet égard. À plusieurs reprises, en effet, les gouvernements américains et australiens ont dû reconnaître que leur contexte politique fédéral limitait leur marge de manœuvre au plan international; tout comme le Canada, et pratiquement dans les mêmes situations, ils ont été contraints de rechercher un traitement particulier et parfois même de s'abstenir[16]. Parmi les domaines où des difficultés communes se sont manifestées de façon plus évidente, malgré les contextes juridiques distincts, on peut mentionner ceux du travail et des droits de l'homme. À la lumière de ces expériences, les États étangers ont acquis une certaine dose de réalisme qui fait que, même s'ils peuvent préférer une solution simple et radicale au problème des États fédéraux, ils demeurent néanmoins ouverts à toute hypothèse de solution compatible avec le maintien d'un minimum de sécurité juridique.

À cet égard, il faut reconnaître que l'hypothèse d'une décentralisation du *treaty-making power* correspondant globalement au partage des compétences législatives, accompagnée d'un droit de légation des provinces, risque de recevoir un accueil plutôt froid à l'extérieur. Au mieux, les États étrangers accepteraient de conclure des accords bilatéraux avec les provinces canadiennes dans des domaines relevant clairement de leur compétence exclusive, ainsi qu'en témoignent les accords informels assez nombreux conclus avec certaines d'entre elles. Même là, la perspective d'avoir à négocier avec dix entités plutôt qu'une pourrait suffire, dans certains cas, à décourager les contacts, ou encore à les limiter aux provinces les plus importantes, avec le résultat que les autres, faute d'interlocuteurs, se verraient coupées du monde extérieur. La possibilité d'une délégation de compétence aux autorités centrales pourrait toujours être envisagée dans ce dernier cas, mais elle ne ferait que souligner l'existence d'un autre problème important, celui de la responsabilité internationale.

Même si les pays étrangers acceptent de traiter directement avec les provinces, il n'est pas dit qu'ils renoncent par le fait même à tenir le gouvernement fédéral responsable pour les engagements de ces dernières. Diverses hypothèses ont déjà été envisagées à cet égard, allant d'une responsabilité exclusive de l'État fédéral à une responsabilité exclusive des États membres, en passant par une responsabilité primaire des autorités centrales et une responsabilité secondaire des gouvernements régionaux ou *vice versa*[17]. Mais au regard du droit international, compte tenu des principes fondamentaux de souveraineté et de responsabilité qui expriment cette préoccupation de sécurité dont nous avons déjà parlé, la solution qui s'impose *a priori* est celle de la responsabilité de principe de l'État fédéral, sauf renonciation des États étrangers qui acceptent, lorsqu'ils traitent avec les provinces, de tenir ces dernières seules responsables. Vu l'existence de dix provinces, et vu la variété de comportements que peuvent adopter les États étrangers, on perçoit facilement le danger de confusion qui pourrait en résulter. Évidemment, si une seule province était impliquée, ce danger ne serait plus le même.

En ce qui concerne le droit de légation des provinces, sa concrétisation dépendra ultimement de la volonté des États étrangers d'établir des relations de droit international avec ces dernières. Plusieurs provinces, ainsi qu'on l'a déjà mentionné, ont des délégations à l'extérieur. En général, ces délégations ne bénéficient d'aucun traitement diplomatique ou consulaire; en pratique, toutefois, il serait probablement assez facile de les faire accéder au statut de consulat. La situation se complique lorsqu'on envisage une participation directe des provinces à des organisations internationales. Dans la vaste majorité des cas, en effet, la charte constitutive de ces organisations ne prévoit pas la participation d'entités autres que des États souverains. Or, il est pratiquement impensable que ces chartes soient modifiées pour faire place aux dix provinces canadiennes, d'autant plus qu'un tel procédé accorderait au Canada une place hors de proportion avec son importance réelle dans le fonctionnement de ces organisations[18]. La seule hypothèse réaliste que l'on puisse envisager à cet égard est qu'une province comme le Québec agisse, dans certains cas, comme représentant du Canada au sein d'organismes culturels francophones.

De façon générale, donc, une décentralisation accrue des pouvoirs dans le domaine des affaires extérieures qui s'alignerait sur le partage des compétences législatives paraît pour le moins problématique au plan externe. La solution idéale, aux yeux des États étrangers, serait que le Canada invente des mécanismes de collaboration interne qui soient de nature à faciliter son action au plan international et à assurer l'exécution de ses engagements dans quelque domaine que ce soit. Comme cette solution, pour être vraiment efficace, implique un minimum de contrôle politique des provinces sur les décisions des autorités centrales en matière de politique extérieure, il n'est pas certain que les États étrangers puissent s'en tirer sans quelques inconvénients. Dans la mesure où ce contrôle politique des provinces s'exercerait vraisemblablement par l'intermédiaire d'une deuxième chambre, l'expérience du Sénat américain ne peut qu'inciter à une certaine prudence.

Le statut particulier

La notion de statut particulier, entendue dans un contexte fédéral, signifie juridiquement qu'un ou plusieurs des gouvernements locaux bénéficient d'un statut distinct au regard même de la constitution. Au Canada, c'est d'abord et avant tout en rapport avec le Québec qu'un tel concept a été mis de l'avant. Dans le domaine des affaires extérieures plus particulièrement, cette notion de statut particulier implique presque nécessairement la reconnaissance d'un *treaty-making power* restreint en fonction de certaines matières précises. À titre d'exemple, on peut facilement imaginer une situation où le Québec assumerait la responsabilité première de ses relations culturelles avec les pays francophones; à la limite, il est même permis d'envisager une situation où le Québec agirait au nom du Canada tout entier. Dans un cas comme dans l'autre, cependant, on considère qu'une reconnaissance constitutionnelle de ce statut particulier serait requise, surtout vis-à-vis l'extérieur.

Pour certains, l'octroi d'un statut particulier ne nécessite pas obligatoirement une atteinte, dans la constitution, à l'égalité de principe de toutes les provinces. Ainsi, pour la Commission de l'unité canadienne, il suffirait, pour arriver au même résultat, que l'on donne

> (...) à toutes les provinces accès aux compétences dont le Québec a besoin pour préserver sa culture et son héritage particuliers, mais d'une manière qui leur permette, si c'est leur volonté, de ne pas exercer ces compétences et d'en confier l'exercice à Ottawa. Deux méthodes permettent d'emprunter cette voie. L'une grouperait ces matières sous le manteau de la compétence concurrente, assortie de la prépondérance provinciale, ce qui aurait pour effet de laisser aux provinces le choix d'exercer ou non leur pouvoir prépondérant en ces domaines. L'autre méthode consisterait à inscrire dans la constitution un mécanisme de délégation législative ou interparlementaire[19].

Assez curieusement, un des seuls exemples d'une telle façon de procéder a trait au domaine des affaires extérieures, plus particulièrement à celui de l'immigration. Ce dernier domaine en est un de compétence concurrente — le Parlement fédéral aussi bien que les assemblées législatives provinciales peuvent légiférer en matière d'immigration — mais avec prépondérance fédérale. Jusqu'à tout récemment, les autorités fédérales occupaient pratiquement l'ensemble du champ, ne laissant aux provinces que de maigres pouvoirs en matière d'accueil des immigrants. Toutefois, à la suite de demandes réitérées de la part du Québec, le gouvernement fédéral, en 1978, acceptait de conclure avec cette province une entente aux termes de laquelle la sélection des ressortissants étrangers désireux de s'établir en permanence au Québec s'effectuerait sur une base conjointe et paritaire, selon des critères québécois et canadiens[20].

Une telle entente, autorisée par l'article 109(2) de la *Loi sur l'immigration*, vient donc préciser la portée de la Loi en définissant la marge de pouvoir normatif et décisionnel laissée au Québec. Dans la mesure où aucune autre province n'a manifesté d'intérêt pour un arrangement semblable, on peut donc voir là une forme atténuée de statut particulier.

Quelle que soit la méthode utilisée pour réaliser le statut particulier, il est clair que celui-ci soulève des problèmes assez délicats, tant en ce qui concerne l'élaboration interne de la politique étrangère canadienne qu'en ce qui concerne la réalisation externe de cette politique.

La perspective interne

L'hypothèse d'un statut particulier dans le domaine des affaires extérieures fait appel, en droit, à des critères de démarcation suffisamment précis pour permettre de distinguer une province des autres. Dès l'abord, on peut sérieusement se demander si, mis à part le Québec, il existe d'autres provinces au Canada qui peuvent prétendre à un tel statut. En effet, il est difficile de voir ce qu'une quelconque province anglophone pourrait réclamer dans le domaine des affaires extérieures qui ne pourrait pas également être réclamé par toutes les autres. Ainsi, s'il est vrai que la plupart des provinces ont des intérêts économiques relativement distincts qu'elles ont cherché à faire valoir de plus en plus énergiquement à l'extérieur ces dernières années, il demeure que toute solution formelle à ce problème vaudrait vraisemblablement pour chaque province, quelle que soit la nature exacte de l'intérêt économique en cause. Dans le cas du Québec, en revanche, sa spécificité culturelle paraît offrir à première vue un critère susceptible de justifier l'octroi d'un statut particulier à cette province dans le domaine des affaires extérieures. Mais en est-il vraiment ainsi, et comment arriver à délimiter de façon précise le domaine de compétence du Québec, à supposer qu'il en soit ainsi?

Il ne suffit certes pas, dans un tel contexte, d'en référer à la compétence générale du Québec dans le domaine des affaires culturelles : toutes les provinces à cet égard sont sur un pied d'égalité. La notion de francophonie, si elle permet de mieux cerner le champ d'intérêt particulier du Québec, ne nous éclaire pas davantage sur la spécificité des besoins du Québec en matière de relations extérieures. En réalité, le seul besoin qui puisse justifier pour la province un statut particulier est de nature d'abord et avant tout psychologique : pour sa survie et son développement en tant que minorité culturelle, le Québec a besoin d'un reflet de lui-même à l'extérieur. À l'encontre des minorités francophones de Suisse et de Belgique, le Québec, en tant que principal représentant de la minorité francophone canadienne, se trouve enclavé dans un milieu culturel qui lui est étranger. À l'encontre des autres provinces du Canada, il ne se voit qu'imparfaitement dans l'image que projette le Canada à l'extérieur. C'est pourquoi le Québec a tant insisté depuis une vingtaine d'années pour avoir des rapports directs avec l'étranger, surtout en ce qui concerne les relations avec les pays francophones[21]. À la suite des disputes occasionnées par les ententes culturelles France-Québec, le Canada a voulu ignorer cette réalité essentielle en signant une entente culturelle avec la Belgique sans le concours du Québec. Or, l'entente est restée lettre morte jusqu'à ce qu'un nouvel arrangement avec la Belgique autorise la création d'une sous-commission culturelle Québec-Belgique directement responsable des relations entre les deux gouvernements[22]. De là à admettre un statut particulier au Québec en matière de relations culturelles avec les pays francophones en général, il n'y a qu'un pas. Mais pour franchir ce dernier, encore faut-il circonscrire en termes juridiques ce besoin essentiel de la province de communiquer directement avec le courant francophone international.

La tâche n'est pas facile. Dans la mesure où les relations culturelles ne sont qu'un aspect de la politique extérieure d'un pays, il est manifeste que le Québec pourrait difficilement agir en toute liberté dans ses relations avec les pays francophones sans que ne surgisse le risque de conflit avec la politique extérieure du Canada. Néanmoins, il y a des solutions à ce problème. On peut chercher à délimiter avec précision le type d'actes qui pourraient être posés dans le domaine des affaires extérieures de manière à minimiser les possibilités de conflits : on pourrait autoriser de façon générale les accords essentiellement administratifs, comme c'est déjà le cas en Suisse, par exemple, de même que tous les autres actes plus formels couverts par un accord-cadre entre le Canada et le pays étranger concerné. Il est douteux, cependant, qu'une telle solution soit perçue par le Québec comme la reconnaissance d'un statut particulier, car il s'agirait là essentiellement de la reconnaissance formelle de pratiques déjà existantes. Une autre solution serait de prévoir une compétence concurrente des gouvernements canadiens et québécois en ce qui concerne les relations culturelles avec les pays francophones, avec prépondérance au gouvernement fédéral. Une telle hypothèse aurait l'avantage de permettre au gouvernement central d'agir au nom des provinces autres que le Québec sans engager foncièrement le Québec. Mais le Québec se retrouverait dans une situation d'infériorité qui pourrait très bien s'avérer inacceptable au niveau des principes. Resterait alors une troisième possibilité qui est celle qui a été exploitée dans l'entente Québec-Canada sur l'immigration : une compétence concurrente aux gouvernements d'Ottawa et de Québec, avec droit de véto pour chacun d'eux. Cette solution aurait l'avantage de sauvegarder à la fois les intérêts du Québec et du Canada tout en les contraignant à un minimum de collaboration.

Quoi qu'il en soit, au-delà de ces diverses hypothèses axées sur l'octroi d'un statut particulier au Québec dans le domaine des relations culturelles, on comprendra que les deux principaux problèmes juridiques à résoudre au plan interne ont trait, d'une part, à la relation à établir entre le bénéficiaire de ce statut et les autres provinces (problème du critère de distinction) et, d'autre part, à la relation à établir entre ce même bénéficiaire et le pouvoir central (problème de la coordination des politiques). Or, ces deux problèmes ne sont pas du même ordre. Le premier, pour être résolu de façon efficace, exige que le langage utilisé pour désigner le bénéficiaire ne laisse aucune place à des demandes identiques de la part d'autres provinces : autrement, le statut particulier, plutôt que de répondre à un problème particulier, sera davantage source de nouvelles difficultés. À cet égard, il n'est pas nécessaire de rappeler jusqu'à quel point la notion de statut particulier semble soulever à prime abord un sentiment de méfiance, particulièrement chez les provinces anglophones. Un des documents mis de l'avant par la

Colombie-Britannique est fort éloquent : « *Flexibility should not be achieved by granting some subject matters to some provinces and denying those matters to other provinces*[23]. »

Le second problème, qui a trait aux relations entre la province bénéficiaire du statut particulier et le pouvoir central, exige la mise en place d'un mécanisme juridique qui garantisse à la fois l'autonomie décisionnelle de la province en cause et la prise en considération des grandes orientations de la politique étrangère du Canada. À défaut d'un tel mécanisme, le statut particulier sera considéré ou bien comme une structure dépourvue de toute signification ou bien comme une épine dans le flanc de la politique étrangère canadienne. Un équilibre délicat devra donc être réalisé pour que le statut particulier soit perçu en pratique comme une solution efficace.

Un tel statut, par ailleurs, vise à répondre à un problème précis qui n'est pas celui de la majorité des provinces. Dans la mesure où l'on considère la division traditionnelle entre le pouvoir de conclure un traité et le pouvoir de légiférer pour mettre en vigueur un traité comme un problème important, on devrait trouver une solution adéquate à celui-ci parallèlement à une solution au statut particulier. Cette dernière serait sans doute axée sur la mise en place de nouveaux mécanismes de consultation, car, si elle rejoint pour l'essentiel le contenu du statut particulier, celui-ci perd concrètement sa signification; on retombe alors purement et simplement dans la problématique du fédéralisme renouvelé.

La perspective externe

Au regard du droit international, le concept de statut particulier soulève sensiblement le même type de problèmes que le fédéralisme renouvelé. La différence essentielle est que l'incertitude et l'incohérence susceptible de résulter de la multiplicité de représentation internationale se trouve ramenée à un niveau beaucoup plus acceptable, dans le cas du statut particulier, qui n'implique en principe qu'une seule province. De fait, l'expérience passée démontre que le droit international n'est pas réticent à reconnaître divers types de statut particulier. Qu'il s'agisse simplement de la reconnaissance du fait que la signature d'un État n'engage pas automatiquement certaines parties de son territoire, qui bénéficient d'un statut d'autonomie, comme, par exemple, le Danemark et les Îles Féroé[24], ou qu'il s'agisse de l'admission officielle d'États membres de fédérations au sein d'organismes internationaux, comme ce fut le cas, pour des raisons pratiques, jusqu'en 1934 pour le Wurtemberg et la Bavière au sein de la Commission européenne[25], ou comme c'est le cas, pour des raisons essentiellement politiques, de l'Ukraine et de la Byolorussie au sein de l'ONU[26], il appert que la capacité d'adaptation du droit international est pratiquement sans limite, pourvu que les données juridiques essentielles soient claires.

Aussi peut-on considérer qu'un statut particulier pour le Québec, à condition qu'il soit délimité clairement au plan constitutionnel, aurait de bonnes chances d'être accepté et reconnu au plan international. En revanche, si ce statut devait découler essentiellement d'arrangements administratifs, il est plausible que la communauté internationale des États serait davantage réticente à en prendre acte. De ce point de vue, on peut considérer que la sécurité juridique essentielle au droit international impose des limites certaines à la façon de réaliser un statut particulier dans le domaine des affaires extérieures.

La souveraineté-association

L'hypothèse de la souveraineté-association implique d'abord, en droit interne, un processus de désintégration dont l'aboutissement ultime est l'apparition d'un nouvel ordre juridique parallèle et égal à l'ancien. Ce nouvel ordre peut se réaliser dans la continuité juridique, comme ce fut le cas pour le Canada vis-à-vis la Grande-Bretagne, ou il peut résulter d'une rupture complète avec l'ancien, comme ce fut le cas pour les États-Unis. Simultanément, la souveraineté-association implique aussi la mise en place de mécanismes de collaboration suffisamment développés pour permettre la réalisation d'une union économique ou à tout le moins d'un marché commun. Évidemment, ce double processus a un impact considérable à l'extérieur. Durant la période de négociations, d'abord, les États étrangers auront l'obligation de respecter la souveraineté du Canada en n'intervenant pas dans ses affaires internes. Par la suite, lorsque le démembrement du Canada sera un fait accompli, ils auront à se prononcer sur l'existence d'un nouvel État. Et comme ce nouvel État sera issu du démembrement d'un autre État, ils auront encore à s'interroger sur ce qu'il advient des engagements pris antérieurement par le Canada. Finalement, du fait que le Canada demeurera un territoire économique unique, ils auront à traiter avec certaines institutions dont les pouvoirs et les responsabilités demeurent encore à définir. En somme, parce qu'il implique essentiellement un passage du droit constitutionnel au droit international, c'est le processus même de réalisation de la souveraineté-association qui intéresse le domaine des affaires extérieures.

La perspective interne

Le premier problème que soulève l'hypothèse de la souveraineté-association concerne le droit de sécession des provinces. Lorsqu'il est envisagé plus particulièrement avec le Québec, référence est souvent faite au droit à l'autodétermination des Québécois; les deux concepts doivent cependant être distingués[27]. En premier lieu, le droit de sécession se présente essentiellement comme un concept de droit constitutionnel, alors que le droit à l'autodétermination est d'abord et avant tout un concept de droit international. En deuxième lieu, le droit de sécession est généralement identifié à un territoire donné, alors que le droit à l'autodétermination se rattache davantage à un peuple. Enfin, la sécession, si elle est l'expression ultime du droit à l'autodétermination, ne constitue pas la seule façon d'exercer ce droit[28]. D'un point de vue interne, et en rapport avec la souveraineté-association, le droit à l'autodétermination n'a de sens, en fait, que dans la mesure où il paraît appuyer une demande qui ne trouve point d'appui dans notre droit constitutionnel.

En effet, bien que l'A.A.N.B. 1867 ainsi que les textes constitutionnels subséquents n'interdisent pas précisément le droit de sécession, l'absence de toute mention à cet égard est généralement interprétée comme signifiant qu'un tel droit n'existe tout simplement pas[29]. Néanmoins, les auteurs sont aussi d'accord pour reconnaître que la sécession, en tant que résultat, pourrait être obtenue soit à la suite d'un amendement constitutionnel, soit à la suite d'une déclaration unilatérale d'indépendance dont l'efficacité serait internationalement reconnue. La première méthode, plus positive, implique d'une certaine façon un acquiescement, un arrangement à l'amiable avec le reste du Canada. Parce que la majorité des Canadiens, sans admettre nécessairement que le Québec bénéficie d'un quelconque droit à l'autodétermination, semblent prêts à admettre qu'une volonté clairement exprimée du Québec de se séparer devrait donner lieu à un arrangement en ce sens, cette première méthode est généralement favorisée. Quant à la seconde méthode, elle est davantage perçue comme une solution ultime dans l'hypothèse d'un désaccord complet entre le Québec et le Canada. Dans la mesure où la souveraineté-association implique, au-delà de l'indépendance du Québec, un traité d'association économique avec le reste du Canada, il paraît raisonnable d'affirmer que la déclaration unilatérale d'indépendance n'est pas compatible avec la réalisation de cette souveraineté-association. Reste donc, pour y arriver, la technique de l'amendement constitutionnel.

Un amendement d'une telle importance, cependant, ne manquerait pas de soulever de nombreux problèmes. Manifestement, le Québec ne pourrait y arriver seul en agissant en vertu de l'article 92(1) de l'A.A.N.B. 1867 : modifier la constitution du Canada pour permettre au Québec de se séparer dépasse de beaucoup la compétence accordée à la province de modifier sa propre constitution. Le Parlement fédéral ne pourrait guère plus y arriver en agissant en vertu du pouvoir d'amendement que lui reconnaît l'article 91(1). Ce pouvoir, en effet, se trouve sévèrement limité par l'interdiction qu'il comporte d'affecter de quelque façon que ce soit le partage des compétences ou encore les droits ou privilèges reconnus aux provinces ou à certaines catégories de personnes; il a été interprété de façon restrictive d'ailleurs par la Cour suprême dans son opinion dans l'*Affaire des questions soumises par le gouverneur en conseil sur la compétence législative du Parlement du Canada relativement à la Chambre haute*[30]. Dans la mesure où la sécession du Québec implique la remise à cette province de pouvoirs législatifs antérieurement détenus par le Parlement fédéral, il faudrait nécessairement avoir recours à la nouvelle procédure d'amendement que prévoit la Loi constitutionnelle de 1982[31]. Cette procédure veut qu'un amendement à la constitution ne soit adopté que sur proclamation du gouverneur général autorisé à la fois par des résolutions du Sénat et de la Chambre des communes ainsi que par les assemblées législatives d'au moins deux tiers des provinces dont la population confondue représente au moins cinquante pour cent de la population entière. Dans les cas particuliers prévus à l'article 41 de la même Loi, toutefois, il est stipulé qu'un amendement touchant à la reine, au gouverneur général ou au lieutenant-gouverneur, à l'usage du français ou de l'anglais, ou encore à la composition de la Cour suprême devra être approuvé par l'assemblée législative de chaque province. Comme la sécession pourrait théoriquement toucher à certains de ces sujets, il n'est pas interdit de penser que le consentement unanime des provinces pourrait être requis pour légaliser un tel changement.

Au-delà de cet aspect foncièrement de procédure, la sécession soulève également, au plan interne, le problème difficile du partage de l'actif et du passif de la Couronne aux droits du Canada. Diverses théories ont été élaborées en droit international pour répondre à ce problème, mais aucune n'a vraiment acquis une acceptation totale. Néanmoins, certaines conclusions très générales peuvent être dégagées. Ainsi, dans un article daté de 1978, Jean-Maurice Arbour, après avoir analysé le problème de la sécession du Québec à la lumière des données pertinentes du droit international, en arrive à formuler les quelques propositions suivantes[32]. S'agissant d'abord de la propriété publique fédérale sise dans les limites géographiques du Québec, l'actif passerait automatiquement au Québec, et ce sans compensation aucune, sauf accord spécial. En ce qui concerne la dette publique canadienne, le Québec, en se fondant sur la pratique internationale, ne serait pas obligé d'en assumer une part quelconque, bien qu'une répartition de dette ait effectivement été réalisée dans certains cas. Toutefois, l'auteur, de concert avec la plupart des publicistes, reconnaît l'existence d'une obligation morale à la charge de l'État nouveau. Dans le contexte de la souveraineté-association, il y a lieu de présumer, vue la dimension positive d'un tel arrangement, que le problème du partage de l'actif et du passif se réglerait à l'amiable.

Une fois le problème de la sécession réglé, il reste encore à envisager celui de l'association. Au plan de la procédure, le problème n'est pas exactement le même. La négociation de l'accord d'association, même si elle précède la sécession proprement dite, se situe au niveau du droit international et implique un statut d'égalité juridique entre les deux parties en cause. La conclusion d'un tel accord n'exigerait donc pas, en tant que telle, que l'on ait recours à la procédure d'amendement prévue dans la Loi constitutionnelle de 1982. Tout au plus peut-on envisager qu'un tel accord, vu son importance, serait soumis pour approbation à la Chambre des communes et au Sénat. En dehors de cette différence essentielle, cependant, il est permis de croire que la négociation de l'accord d'association procéderait plus ou moins de la même façon que les discussions sur la sécession, vu l'intime relation entre les deux au niveau du résultat recherché. Le gouvernement fédéral agirait-il en son nom et au nom des provinces, après consultations avec celles-ci? Une équipe spéciale de négociateurs serait-elle constituée, composée de représentants de chacun des gouvernements impliqués? La population canadienne serait-elle consultée, par référendum ou autrement? Le gouvernement fédéral, compte tenu de sa compétence exclusive dans le domaine du commerce international, pourrait-il engager les provinces contre leur volonté? Toutes ces questions demeurent évidemment sans réponse pour le moment.

Une fois la souveraineté-association réalisée, le Québec et le Canada, au plan interne, seraient libres de conduire leurs relations extérieures comme ils l'entendent, sujet, cependant, aux limites découlant de l'accord d'association. Dans la mesure où l'union économique entre le Québec et le Canada serait maintenue, il va de soi que la politique commerciale extérieure des deux États devrait être élaborée en commun, comme c'est le cas à l'heure actuelle au sein des communautés économiques européennes[33]. Les accords commerciaux engageant l'union économique seraient conclus au nom de celle-ci ou des deux États conjointement. Dans la mesure enfin où une monnaie commune serait maintenue, des conclusions similaires vaudraient pour la politique monétaire.

Au simple plan de l'efficacité, cependant, on peut sérieusement s'interroger sur le réalisme d'une structure décisionnelle essentiellement paritaire dans un domaine aussi lourd de conséquence que le domaine économique. L'exemple du marché commun ici n'est pas particulièrement utile; l'arbitrage susceptible de résulter des opinions diverses exprimées au sein d'un groupe de six ou neuf États ne peut tout simplement pas se réaliser dans une confrontation d'un à un. L'un ou l'autre doit éventuellement céder. À court terme, une volonté réelle de conciliation peut permettre de résoudre de nombreux problèmes; à long terme, cependant, les chances de rupture paraissent beaucoup plus grandes. Une façon possible de réaliser l'arbitrage entre les deux États serait de confier à des institutions communautaires indépendantes un rôle analogue à celui de la Commission au sein de la Communauté économique européenne : celle-ci, comme on le sait, a un droit d'initiative en matière de formulation de politiques, et un refus du Conseil des ministres, représentatif des États, renvoie tout simplement un projet devant la Commission[34]. Mais dans le contexte d'un passage du fédéralisme à la souveraineté-association, est-il encore possible de songer à des institutions communautaires indépendantes? Le livre blanc du gouvernement québécois sur la souveraineté-association fait très bien ressortir cette ambiguïté d'un système qui se veut d'abord et avant tout de droit international, mais qui au fond ne peut survivre que s'il repose sur une solide base de droit communautaire dont la parenté avec l'idée fédéraliste a toujours été évidente.

La perspective externe

D'un point de vue externe, la mise en branle des négociations devant conduire à la souveraineté-association ne manquera probablement pas d'attirer l'attention de plusieurs pays qui peuvent être tentés d'intervenir avant le fait de manière à influencer le cours des événements dans un sens favorable à leurs intérêts. Certains pourront voir d'un mauvais œil le démantèlement de l'État canadien; d'autres seront davantage préoccupés par la portée exacte de l'association économique à venir. Quoi qu'il en soit, ils se devront en principe de manifester une certaine retenue à cet égard, vu la règle de droit international qui veut qu'un État souverain ne s'immisce pas dans les affaires internes d'un autre État souverain. En pratique, il est permis de croire qu'en fait la vaste majorité des États respecteront cette règle. Toutefois, rien n'interdit aux parties canadiennes en cause d'établir de contacts discrets avec l'étranger dans le but de préparer un éventuel appui extérieur au cas où les négociations viendraient à échouer. Une telle hypothèse, cependant, si elle devait se concrétiser, augurerait très mal de l'avenir des négociations et ouvrirait toute grande la porte à une intervention étrangère.

Une fois les négociations sur la souveraineté-association complétées, le nouvel arrangement devrait pouvoir entrer en vigueur au plan interne sans trop de difficultés. Au plan international, toutefois, l'apparition d'un nouvel État, déjà économiquement intégré à un autre au moment de sa naissance, ne manquera pas de soulever certaines interrogations chez les États étrangers. Ceux-ci feront connaître leur réaction en reconnaissant ou ne reconnaissant pas le nouvel arrangement. Vu le caractère consensuel de l'arrangement en question, cette reconnaissance en pratique devrait suivre facilement. Néanmoins, il est à prévoir que la nouvelle association économique, surtout si elle implique une monnaie commune, posera certains problèmes en ce qui concerne la participation conjointe du Québec et du Canada à des organismes économiques tel le Fonds monétaire international. Il est difficile de voir, en effet, comment le Québec et le Canada pourraient prétendre représenter des intérêts distincts, avoir des comptes de tirages séparés et, de façon générale, bénéficier d'une double représentation au sein de ce dernier organisme, s'ils maintiennent une monnaie commune[35]. Pour les autres organismes internationaux à vocation économique, la portée exacte de l'union réalisée entre le Québec et le Canada déterminera le type de solution à adopter entre la représentation distincte et la représentation conjointe, compte tenu évidemment des statuts de chaque organisme. Dans le cas du GATT, il est à prévoir que la solution retenue serait de type communautaire, comme dans le cas de la Communauté économique européenne. Dans le cas de l'Organisation de coopération et de développement économique, par ailleurs, une représentation distincte paraîtrait beaucoup plus vraisemblable. Quoi qu'il en soit, la règle fondamentale qui guidera les décisions à cet égard est assez claire : la représentation sera conjointe ou séparée selon que la responsabilité au plan international sera assumée conjointement ou séparément.

Au-delà de ce problème de reconnaissance mais en relation étroite avec celui-ci, les États étrangers ne manqueront pas de s'interroger sur ce qu'il advient des engagements internationaux antérieurement assumés par le Canada. La réponse de principe du droit international à ce problème est assez simple : le nouvel État est entièrement libre d'accepter ou de refuser les engagements internationaux de l'État dont il est issu[36]. Quant à ce dernier, il demeurera lié par ses engagements, sauf dans la mesure où ces derniers sont affectés par la perte de territoire conséquente. L'acceptation de l'État sécessionniste, ou son refus, suivant les engagements, pourra prendre la forme d'une déclaration expresse ou résulter tout simplement de la conduite de l'État. Certains auteurs établissent une distinction entre la sécession radicale et violente, qui donnerait généralement lieu à un rejet global des accords antérieurs, et la sécession par négociation, où la continuité des engagements serait davantage la règle[37]. Il s'agit là essentiellement d'une constatation *a posteriori* et non d'une norme juridique; dans le cas de la souveraineté-association, néanmoins, il est plausible qu'elle se vérifierait à nouveau, particulièrement dans le domaine économique. Ainsi, peut-on facilement imaginer que le Québec maintiendrait l'accord entre le Canada et les États-Unis relatif à la voie maritime du Saint-Laurent. On peut présumer aussi que les accords de double fiscalité entre le Canada et nombre de pays étrangers seraient maintenus, car déjà le Québec les étend, sur une base purement volontaire, à ses propres taxes[38]. Enfin, toujours dans le cadre de la souveraineté-association, il faut prendre pour acquis que les accords de commerce avec les États étrangers ne seraient modifiés que d'un commun accord. Dans le domaine politique, et plus particulièrement dans le domaine culturel, par ailleurs, il est à présumer qu'un examen en profondeur de tous les traités conclus par le Canada serait effectué.

L'indépendance

D'un point de vue strictement juridique, l'indépendance pure et simple du Québec soulève fondamentalement le même type de problèmes que la souveraineté-association, à cette différence près que l'indépendance, contrairement à la souveraineté-association, peut résulter d'une rupture violente des relations entre le Québec et le reste du Canada. Dans cette perspective, les éléments essentiels ont trait, au plan interne, à la signification d'une déclaration unilatérale d'indépendance, et, au plan externe, au rôle de la reconnaissance internationale dans l'hypothèse d'un refus du Canada d'admettre la sécession du Québec.

La perspective interne

Si l'on prend pour acquis, en se fiant au livre blanc du gouvernement québécois sur la souveraineté-association, que l'indépendance pure et simple du Québec viendrait à la suite d'un échec des négociations avec le reste du Canada, on peut présumer que la procédure choisie pour y arriver serait celle de la déclaration unilatérale d'indépendance. Or, une telle déclaration, dans la mesure où elle remet en cause la souveraineté du Canada sur une partie de son territoire, appelle immédiatement une prise de position de la part du gouvernement canadien. Deux options s'ouvrent alors. Celui-ci pourrait d'abord donner un accord de principe à la déclaration du Québec, sous la forme d'une entente entre représentants des deux gouvernements. Cette entente pourrait subséquemment être transposée au plan interne par des lois du Parlement canadien d'une part, et du Parlement québécois d'autre part, un peu comme en 1922 un accord fut conclu entre l'Angleterre et l'Irlande qui conduisit à l'adoption, par le Parlement britannique, du *Irish Free State (Agreement) Act* quelques mois plus tard[39].

L'autre possibilité, qui pourrait se concrétiser particulièrement si le référendum sur l'indépendance ne paraissait pas convainquant, serait que le gouvernement canadien rejette la déclaration unilatérale d'indépendance du Québec et cherche à faire invalider judiciairement et administrativement toute incursion de la province dans les domaines de compétence proprement fédéraux. En d'autres termes, le gouvernement canadien adopterait purement et simplement le raisonnement formulé en 1968 par le Comité judiciaire du Conseil privé relativement à la déclaration unilatérale d'indépendance de la Rhodésie, dans l'affaire *Madzimbamuto* c. *Lardner-Burke*[40]. Il fut jugé alors que les lois adoptées par le régime sécessionniste de Rhodésie étaient illégales, compte tenu du fait que le gouvernement de Westminster, loin d'avoir renoncer à exercer sa souveraineté sur la Rhodésie, avait pris des mesures concrètes pour faire valoir cette souveraineté. Contrairement à l'Angleterre, dont les moyens d'intervention en Rhodésie demeuraient limités compte tenu de l'éloignement, le Canada serait certainement en bonne position pour réaffirmer sa compétence sur le territoire québécois. À l'inverse, cependant, cette réaffirmation de compétence ne pourrait demeurer aussi longtemps inefficace : autrement, compte tenu encore une fois des circonstances, il faudrait conclure à une renonciation implicite du Canada. Les tribunaux québécois ne pourraient certes suspendre leurs décisions au-delà d'une certaine limite de temps, et, à défaut d'autres indications, il est à prévoir qu'ils se fonderaient sur l'exercice réel du pouvoir politique pour décider de la légalité ou de l'illégalité des gestes posés par le régime sécessionniste québécois.

La perspective externe

Tout comme la déclaration unilatérale d'indépendance appelle une réaction de l'État souverain en droit interne, l'apparition d'un nouvel État, en droit international, appelle une réaction de la part des gouvernements étrangers. Lorsque ce nouvel État résulte d'un arrangement à l'amiable, son acceptation par les États étrangers suit presque automatiquement, et le rôle exact de la reconnaissance, en rapport avec l'apparition de ce nouveau sujet de droit international, demeure alors une question théorique. La situation est toute différente lorsque le nouvel État en puissance voit son existence niée dès le départ par l'État dont il prétend se séparer. Dans un tel cas, la controverse classique entre la théorie de la reconnaissance « constitutive » et la théorie de la reconnaissance « déclaratoire » redevient actuelle[41]. Derrière cette controverse, qui tourne autour de la question de savoir si la reconnaissance conditionne la naissance d'un nouvel État ou si elle ne fait que la constater, le véritable problème qui se dessine est celui de l'efficacité, en droit international, d'une déclaration unilatérale d'indépendance. Force est bien de constater que, plus un État aspirant exerce un contrôle efficace sur son territoire, moins il a besoin d'une reconnaissance internationale pour assurer son existence, auquel cas la reconnaissance a surtout un effet déclaratoire; et, à l'inverse, moins un État paraît exercer un contrôle efficace sur son territoire, plus la reconnaissance semble essentielle à sa survie, auquel cas elle sera considérée comme ayant un effet constitutif. Le Bangla Desh et le Biafra sont deux précédents qui illustrent très bien l'une et l'autre hypothèse.

Dans le cas du Québec, le rôle de la reconnaissance sera donc conditionné dans une large mesure par l'attitude du gouvernement du Canada. Si celui-ci devait rejeter sans appel la déclaration unilatérale d'indépendance du Québec et utiliser tous les moyens à sa disposition pour maintenir son autorité sur le territoire québécois, la situation difficile dans laquelle se retrouverait le Québec rendrait d'autant plus essentielles les manifestations d'appui extérieures. Aussi longtemps que la situation ne sera pas clarifiée dans les faits, il est à prévoir que la vaste majorité des États étrangers s'abstiendront de toute reconnaissance hâtive susceptible d'être considérée, en droit, comme une intervention indue dans les affaires d'un État souverain. Pour le Québec, le risque serait donc grand de se retrouver alors isolé et sans appui. Si le Canada devait continuer à exercer ses compétences au Québec de façon ininterrompue, il faudrait très vite, comme dans le cas du Biafra, parler d'un échec de la tentative sécessionniste du Québec. À l'inverse, si le Québec devait s'assurer, pendant cette période transitoire, l'exclusivité de l'exercice de la compétence législative sur son territoire, un nombre croissant d'États reconnaîtraient probablement, avec le temps, le nouveau sujet de droit international.

Une fois le Québec séparé du Canada et admis en tant que nouvel État indépendant au sein de la communauté internationale, la conduite de ses relations extérieures, cela va de soi, ne serait plus sujette à des restrictions de nature juridique, du moins en dehors des exigences du droit international. Certains problèmes, tels que, par exemple, ceux découlant de la succession d'État ou encore celui du transit entre les parties est et ouest du Canada, exigeraient certes des solutions rapides dans l'immédiat. Mais il s'agirait là de questions à régler entre États indépendants et non plus de questions internes.

Conclusion

Au terme de cette étude, la conclusion fondamentale qui s'impose, en ce qui concerne les problèmes juridiques susceptibles d'être soulevés dans le domaine des affaires extérieures, a trait à la passivité relative de l'ordre juridique international face aux divers types de solutions envisagés. S'agissant d'abord de la souveraineté-association et de l'indépendance, la préoccupation essentielle du droit international concerne l'efficacité des changements opérés. Dans cette perspective, c'est avant tout le caractère consensuel ou conflictuel des changements qui déterminera le rôle exact du droit international en tant que contrainte extérieure. Une fois le problème de la reconnaissance réglé, la personnalité internationale des parties en cause sera pleine et entière, et donnera ouverture à une participation distincte aux organismes internationaux, à cette exception près que, dans le cas de la souveraineté-association, une participation conjointe à certains organismes à vocation économique s'imposera dans les faits.

Paradoxalement, ce sont les hypothèses du fédéralisme renouvelé et du statut particulier qui soulèvent, au regard du droit international, le plus de problèmes[42]. La préoccupation essentielle ici concerne la responsabilité de l'État canadien en tant que sujet de droit international. En effet, les contraintes inhérentes à la structure fédérale du Canada limitent la capacité du gouvernement canadien de s'engager de façon responsable au plan international, ce qui ne manque pas d'inquiéter les pays étrangers. Mais, par ailleurs, l'hypothèse d'une représentation multiple des intérêts canadiens au plan international entraîne le risque d'une dilution de l'obligation de responsabilité qui incombe au Canada comme à tous les autres États, ce qui semble tout aussi dangereux. Entre ces deux maux, le droit international souhaite seulement ne pas avoir à choisir. L'idéal serait donc d'en arriver à une solution qui soit efficace au plan interne et qui ne mette pas en cause le principe fondamental de la responsabilité internationale. À cet égard, la solution la plus logique, pour autant, évidemment, qu'on demeure dans un contexte fédéral, paraît aller dans le sens d'une amélioration des mécanismes de collaboration intergouvernementale dans le domaine général des affaires extérieures, d'une part, et d'une représentation distincte des intérêts culturels du Québec, d'autre part. Au-delà des prises de positions de principe, qui souvent n'offrent qu'un semblant de solutions valables, il y a là, croyons-nous, une possibilité de règlement efficace. À moins, bien sûr, qu'il ne soit trop tard et que le temps des décisions radicales ne soit venu.

Notes

1. Sur l'accession du Canada à l'indépendance, voir, de façon générale, George F.G. Stanley, *A Short History of the Canadian Constitution*, Toronto, Ryerson Press, 1969. Voir également Brian M. Mazer, « Sovereignty and Canada: An Examination of Canadian Sovereignty From a Legal Perspective », *Saskatchewan Law Review*, 42 (1977–78), pp. 1–15. Sur les implications du statut d'État indépendant en droit international, voir, de façon générale, Georg Schwarzenberger, *International Law*, 3^e éd., Londres, Stevens and Sons, 1977, vol. 1, chap. 6.

2. La question de la responsabilité de l'État fédéral sur ses États membres au regard du droit international est étudié dans Ivan Bernier, *International Legal Aspects of Federalism*, Londres, Longman Group, 1973, chap. 2.

3. En 1965, le professeur Bora Laskin, avant qu'il ne devienne plus tard juge en chef de la Cour suprême du Canada, écrivait qu'en vertu du droit international général, « *only one juridical personality can be recognized in a federal state* » (« The Provinces and International Agreements », dans *Background Papers and Reports*, Ontario Advisory Committee on Confederation, Toronto, The Queen's Printer of Ontario, 1967, vol. 1, pp. 101–113).

4. Voir Bernier, *International Legal Aspects* . . . , chap. 1.

5. Voir, de façon générale, Anne-Marie Jacomy-Millette, *L'introduction et l'application des traités internationaux au Canada*, Paris, Librairie générale de droit et de jurisprudence, 1971.

6. Voir, par exemple, Ronald G. Atkey, « Provincial Transnational Activity: An Approach to a Current Issue in Canadian Federalism », dans *Background Papers and Reports*, Ontario Advisory Committee on Confederation, vol. 2, p. 161. On trouve une bibliographie assez complète dans Donald C. Story, « Government — A 'Practical Thing': Towards a Consensus on Foreign Policy Jurisdiction », dans *Canada Challenged: The Viability of Confederation*, R.B. Byers et Robert W. Reford, éd., Toronto, Canadian Institute of International Affairs, 1979, p. 119, n. 35.

7. Pour les plus récents développements, voir Anne-Marie Jacomy-Millette, « Le rôle des provinces dans les relations internationales », *Études internationales*, 10 (1979), pp. 285–320.

8. Voir, par exemple, N.A.M. MacKenzie, « Canada and the Treaty-Making Power », *La revue du Barreau canadien*, 15 (1937), pp. 401–454. Pour les écrits plus récents, voir Gerald L. Morris, « The Treaty-Making Power: A Canadian Dilemma », *La revue du Barreau canadien*, 45 (1967), pp. 478–512; et Story, « Government — A 'Practical Thing' . . . », p. 133.

9. A. Dufour, « Fédéralisme canadien et droit international », dans *Canadian Perspectives on International Law and Organization*, R. St. J. Macdonald, Gerald L. Morris et Douglas M. Johnston, éd., Toronto, University of Toronto Press, 1974, p. 72. Voir aussi Ronald G. Atkey, « The Role of the Provinces in International Affairs », *International Journal*, 26 (1970–71), pp. 249–273.

10. Très caractéristique à cet égard est la conclusion du Comité sur la Constitution de l'Association du Barreau canadien (*Vers un Canada nouveau*, Montréal, Fondation du Barreau canadien, 1978, p. 137).

11. Story, « Government — A 'Practical Thing' . . . », p. 124.

12. Voir, à ce sujet, Canada, Secrétariat des Conférences intergouvernementales canadiennes, *Propositions constitutionnelles 1971–1978*, Ottawa, Le Secrétariat, 1978, p. 275.

13. Ontario, Comité consultatif de la Confédération, *Le partage des pouvoirs entre les gouvernements fédéral et provinciaux : deuxième rapport du Comité consultatif de la Confédération*, Toronto, Le Comité, 1979. La mise de l'avant contenue dans le rapport de la Commission constitutionnelle du parti libéral du Québec (*Une nouvelle fédération canadienne*, Montréal, le parti libéral du Québec, 1980) se rapproche de cette position.

14. Outre le rapport du Comité sur la Constitution de l'Association du Barreau canadien, *Vers un Canada nouveau*, voir Canada, Parlement, Le Comité spécial mixte du Sénat et de la Chambre des communes sur la Constitution du Canada, *Rapport final*, Ottawa, Information Canada, 1972; de même que le rapport du gouvernement de l'Alberta, *Harmony in Diversity: A New Federalism for Canada*, Edmonton, Queen's Printer, 1978.

15. Voir, entre autres, Edward McWhinney, « Canadian Federalism, and the Foreign Affairs and Treaty Power. The Impact of Quebec's "Quiet Revolution" », *Annuaire canadien de droit international*, 7 (1969), pp. 3–32.

16. Voir Bernier, *International Legal Aspects* . . ., pp. 152–171.

17. *Ibid.*, pp. 107–114.

18. Voir Jacomy-Millette, « Le rôle des provinces . . . », p. 308.

19. Canada, Commission de l'unité canadienne, *Se retrouver : observations et recommandations*, Ottawa, ministre des Approvisionnements et Services Canada, 1979, pp. 92–93.

20. *Entente entre le Gouvernement du Canada et le Gouvernement du Québec portant sur la collaboration en matière d'immigration et sur la sélection des ressortissants étrangers qui souhaitent s'établir au Québec à titre permanent ou temporaire*, signée à Montréal, le 20 février 1978.

21. Secrétariat des Conférences intergouvernementales canadiennes, *Propositions constitutionnelles 1971–1978*; voir également Louis Sabourin, « L'action internationale du Québec », *Perspectives internationales* (mars-avril 1977), pp. 3–8.

22. Voir « Un accord culturel reste lettre morte », *Le Soleil* (Québec), 9 février 1974. L'annonce de la création de la sous-commission culturelle Québec-Belgique se retrouve dans le communiqué n° 104 du ministère canadien des Affaires extérieures, en date du 29 octobre 1975.

23. Colombie-Britannique, « The Distribution of Legislative Powers » (Paper No. 8), dans *British Columbia's Constitutional Proposals. Presented to the First Ministers Conference on the Constitution. October, 1978*, Victoria, Queen's Printer, 1978, p. 33.

24. Voir Michael Bothe, « Regional Autonomy and Independence: The Consequences for the Legal Order of the Communities », *Common Market Law Review*, 15 (1978), pp. 393–414.

25. Bernier, *International Legal Aspects* . . . , p. 40.

26. *Ibid.*, p. 65.

27. Voir, par exemple, Jacques Brossard, *L'accession à la souveraineté et le cas du Québec : conditions et modalités politico-juridiques*, Montréal, Les presses de l'université de Montréal, 1976, pp. 59 – 310, où cette distinction correspond à deux titres distincts.

28. L'exercice du droit à l'autodétermination, par le biais d'un référendum ou autrement, pourrait aussi bien conduire au maintien pur et simple du lien existant. Ceci soulève la question de savoir si le droit à l'autodétermination, une fois exercé, ne se trouve pas par le fait même épuisé au regard du droit international. Sur le droit à l'autodétermination en rapport avec la question du Quebec, voir John Claydon et John D. Whyte, « Legal Aspects of Quebec's Claim for Independence », dans *Must Canada Fail?*, Richard Simeon, éd., Montréal, McGill-Queen's University Press, 1977.

29. Brossard, *L'accession à la souveraineté* . . . , pp. 250 – 256.

30. *Dans l'affaire des questions soumises par le gouverneur en conseil sur la compétence législative du Parlement du Canada relativement à la Chambre haute, formulées dans le décret C.P. 1978 – 3581 en date du 23 novembre 1978*, (1980) 1 R.C.S. 54.

31. Brossard, *L'accession à la souveraineté* . . . , pp. 275 – 281.

32. J.-Maurice Arbour, « Secession and International Law — Some Economic Problems in Relation to State Succession », *Cahiers de droit*, 19 (1978), pp. 285 – 338.

33. Ce qui fait, par exemple, que c'est la Commission des Communautes qui a participe aux recentes negociations GATT et non les États membres.

34. Sauf en cas d'unanimite; voir l'article 149 du *Traite instituant la Communauté économique européenne*.

35. L'article 6 du *Traite amendé instituant le Fonds monetaire international* oblige les membres, entre autres choses, « à collaborer avec le Fonds et avec les autres membres pour assurer le maintien de dispositions de change ordonnées et de promouvoir un système stable de taux de change ». Le Canada et le Quebec separement pourraient difficilement assumer une telle obligation.

36. Voir Brossard, *L'accession à la souveraineté* . . . , pp. 429 – 463; Sir Arnold Duncan McNair, *The Law of Treaties*, Londres, Oxford University Press, 1961, p. 640.

37. Brossard, *L'accession à la souveraineté* . . . , p. 432.

38. Voir la *Loi de l'impôt provincial sur le revenu*, S.R.Q. 1964, chap. 69, art. 12.

39. Voir *Moore and Others c. Attorney-General for the Irish Free State and Others*, (1935) A.C. 484.

40. (1969) 1 A.C. 645.

41. Pour les références pertinentes à la doctrine, voir Brossard, *L'accession à la souveraineté* . . . , p. 398.

42. Cette opinion est également partagée par Gerald L. Morris, « Quebec and Sovereignty: The Interface Between Constitutional and International Law », dans *The Constitution and the Future of Canada*, Special Lectures of the Law Society of Upper Canada, Toronto, Richard De Boo, 1978, pp. 47 – 65.

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External Economic Relations and Constitutional Change

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External Economic Relations and Constitutional Change

Introduction

A country's external economic relations are basically shaped by three sets of factors: world demand, or the evolution of economic forces outside the country; domestic supply, or the country's response to world demand, given its resources endowments and economic potential; and domestic policies, or the series of on-going and discretionary measures the country takes that influence its role in the world economy.[1]

The object of this paper is to survey the probable effects on Canada's and Quebec's international economic relations of each of four constitutional options. The first set of factors determining these relations, referred to as 'world demand', remains the same under the different options. But the other two, 'domestic supply' and 'domestic policies' (particularly the latter), are likely to be affected by the option chosen. In the following pages I shall summarize very briefly some of the principal forces currently acting on world demand and then consider international economic relations from a Canadian perspective. I shall discuss the manner in which Canada and Quebec participate in the world economy and identify some of the major economic-policy concerns that relate to their respective international roles. Finally, I shall consider the ways in which the choice of different constitutional options — classical federalism, special status for one or more provinces, an independent Quebec, and sovereignty-association — would affect the external relations of the two economies.

There are three obstacles to the successful pursuit of this objective. First, the four options are imprecise and mean different things to different people. Secondly, although this paper does not discuss the domestic economy, yet external economic relations are strongly influenced by domestic trends and policies. Moreover there is a very large element of uncertainty involved in any survey of constitutional options. This uncertainty arises from both behavioural assumptions (Will people behave in the rational manner hypothesized?) and the so-called 'transitional problem'. Although we might assume that under certain conditions a particular equilibrium would be attained in the long run, changes occurring in the meantime may prevent society from reaching that equilibrium even if events verify the assumptions. For these reasons I cannot forecast in this paper precisely what circumstances might evolve under any of the constitutional options that might be adopted.

Selected Factors Influencing World Demand

Canada's external relations are influenced by the multifarious factors making up the world market and constantly modifying its character. It is posited that constitutional change within the Canadian economic space is unlikely to affect world demand significantly. On the other hand, since the economics of both Canada and Quebec are very open, conditions in the international market provide the framework within which different constitutional options can be exercised. For this reason we shall look at some of the most important factors currently influencing world trade before we turn to an examination of Canada's place in this trade.

The Changed Energy-Supply Picture

Despite the current oil glut on world markets, the oil and gas shortages of 1973–74 and 1978–79 have had long-term effects on the international economic landscape. Those most relevant to our theme include the prospects of slower economic growth and the changes in the ranking of claims on funds available for investment.

Hydrocarbon price hikes and shortages in the 1970s led to a large-scale transfer of purchasing power from oil importers to oil exporters. The fact that the exporters did not use up their new purchasing power to buy goods and services from the oil-importing countries, plus the uncertainties created by the oil crises, led to a slow-down in economic growth in the United States, Europe, and Japan. The slow-down, which has been characterized by high unemployment and inflation, is continuing into the 1980s, bringing with it a climate of extreme prudence among investors and of looking inward among governments.

As a result of this prudence and of the need to absorb higher energy costs, investments that appeared attractive in the early 1970s are now less so. This change affects Canada's attractiveness to foreign investors. In the early 1970s Canada held trump cards. Widespread fears of impending exhaustion of raw materials, particularly minerals, as well as the realization of the limits to growth imposed by a finite environment and the resulting concern about the level of pollution in the smaller industrialized countries seemed to give a resource-rich, sparsely populated territory a leading edge in attracting capital. But these advantages have been overshadowed, at least temporarily, by shorter-term anxiety about stagflation and medium-term concern to reduce energy consumption. As a result Canada is not perceived as such an attractive location for investment today as it was ten years ago, except by those industries dependent on large supplies of electricity or natural gas.

The Post–Tokyo Round Trading Environment

The conclusion of the six-year multilateral trade negotiations (MTNs) in 1979 signalled the consolidation of the three major trading blocks: the United States, the European Community (EC), and Japan. Canada was not able to pursue its own strategy as a medium-sized power in these negotiations as it had done in the Kennedy Round. One could almost say that medium-sized powers had been absorbed or reduced to marginal status in the General Agreement on Tariffs and Trade (GATT) negotiations over the intervening years. This leaves Canada in a highly exposed position, with little option but to rely on the United States for support *vis-à-vis* the other two trading blocs. However, although they share many concerns, Canada and the United States do not have identical trade objectives. The new power structure, therefore, tends to make Canada more dependent on the United States and hence more vulnerable than it was previously.[2]

Another result of the Tokyo Round negotiations is that tariff rates have become much less important in many industrial sectors.[3] Non-tariff barriers (NTBs) have consequently assumed greater importance. This means that to be worthwhile, any trade agreements that Canada or Quebec may wish to conclude with other countries will have to be based on mutually satisfactory reduction in NTBs, including access to government purchasing and freedom from countervailing action against industrial development-incentive programs.

However, all the active participants in world trade are now acutely aware of the potential impact of NTBs on their respective industrial strategies. The Codes of Conduct negotiated in Geneva are being closely scrutinized to determine their implications for domestic economic policy. Each country is likely to apply them as defensively as possible while taking maximum advantage of any loopholes. The post–Tokyo Round environment will, therefore, be one of competitive, even if controlled, protectionism with little scope for 'free riding' or for individual initiatives by small countries.[4]

The United States in the 1980s

Although trends in the American economy are of major importance to Canada, they cannot all be reviewed here. Among the most significant is the long-term slow-down in the rate of growth — particularly that of productivity growth — that was apparent even before the oil crisis.[5] This trend, combined with the inability to overcome stagflation, is likely to accentuate still further the post-1970s switch by the United States from a generally liberal trading stance to an increasingly inward-looking and defensive one. In such a climate, protectionist pressure groups tend to rally more support power than those that promote trade liberalization, and despite the market orientation of the Reagan administration, they may be able to block Canadian and Quebec industrial transformation strategies by insisting on a strict and legalistic interpretation of the recently negotiated Codes of Conduct.[6] This means that successful penetration of the American market will require that the private sector work more closely with the different levels of government to make the best use of existing opportunities.

Meanwhile, within the United States, there is no sign of a slackening in the shift of economic activity to the Southwest. The significant depreciation of the American dollar over the past ten years has made investment at home relatively much more attractive to Americans than it was in the 1950s and 1960s. These two factors, along with the reduction in tariff barriers, mean that new investment or the expansion of existing facilities in Canada by American firms will have to satisfy much more stringent profitability criteria than they had to satisfy in the past.

The Emergence of the Newly Industrializing Countries

The newly industrializing countries, which include the fast-growing countries of Southeast Asia and some of the major Latin American nations, offer important market opportunities for Canada in the short run. During the down-turn in world trade in the mid-1970s, their imports were of major importance in sustaining export levels in the industrialized countries.[7] Their demand structure is complementary to Canada's supply potential in a number of areas, but as yet Canadian exporters have left this market relatively untapped.[8]

In the long run, however, the newly industrializing countries may undercut Canadian production in both the labour-intensive sectors of the economy and in the export of resource-based products. With potentially large domestic markets and low wages, they are already able to benefit from economies of scale as well as from cheap labour and, in some countries, from a resource base comparable to Canada's.

Footloose Comparative Advantage

An important characteristic of international trade today is that exporters cannot count on continuing to sell traditionally successful products based on natural resources or long-established skills. A country's comparative advantage has to be continually re-established and maintained. With the exception of products based on a few very scarce natural resources, an increasingly large number of competing countries can produce virtually every type of goods or service. Cost competitiveness depends on factors such as technology breakthroughs, inflation rates, management skills, and access to capital that alter over time. Many countries are finding that the vulnerability of their export advantages requires them to establish quite sophisticated co-ordination mechanisms among business, labour, and government in order to sustain, develop, and promote potentially competitive exports.

Canada and Quebec: Examples of an Open Economy

International trade in goods and services is vital to the Canadian and Quebec economies. With sales outside the province equal to approximately 40 per cent of gross provincial product, Quebec is one of the most economically open societies in the world. Canada as a whole is among the most trade-dependent countries, with exports of goods and services valued at approximately 23 per cent of gross national product and imports at 27 per cent. Imports are of major importance in determining the cost of living in Canada: it has been estimated that a 1 per cent depreciation of the Canadian dollar or a 1 per cent increase in the price of all imported goods leads to a 0.5 per cent increase in the consumer price index. In this section we shall review features of Canada's international transactions and examine the way in which Canadians and their trading partners view the country's external economic relations.

Canadian and Quebec External Trade

Canada's foreign sales and purchases of goods follow a well established pattern that shows little sign of changing. About three quarters of both export and import transactions are concluded with the United States. Moreover intra-firm transactions are estimated to have accounted for approximately 60 per cent of Canadian sales to the United States in 1976.[9] Canada regularly incurs a very large deficit on trade in finished products in both the machinery and equipment and the consumer-goods sectors; this deficit has been traditionally balanced by a surplus on sales of raw materials and semi-processed and agricultural goods. In 1980, for example, a surplus of approximately $23 billion on commodities and industrial raw materials more than compensated for a deficit of $18 billion on finished products, giving Canada a surplus on its merchandise-trade account.[10]

When we look at Quebec, the concentration of exports by both composition and destination is even more striking. Foreign sales are largely concentrated in a small number of crude and semi-processed products destined for the Northeastern and North-Central regions of the United States. In the 1970s ore (17 per cent), non-ferrous metals (12 per cent), asbestos (6.5 per cent), and forest products (16 per cent), excluding pulp and paper, made up more than 41 per cent of Quebec's foreign sales, while more than 80 per cent of the province's exports to the United States in 1974 were destined for the Atlantic-Centre, North East-Centre, and New England States.[11] Very little diversification in either the destination or the composition of these foreign exports was observable from 1969 to 1976, a period during which Quebec's share of Canada's exports was falling.

Such a trade pattern clearly reveals a certain vulnerability in terms of dependence on one market and on raw and semi-processed goods. Since prices for raw materials, agricultural commodities, and industrial materials are generally set by world-market conditions, and their sale is often determined by long-standing contracts, Canadian policies have relatively little impact, at least in the short run, on export volumes. Traditionally Canada has run a surplus on its exports of goods, but this surplus tended to decline during the 1970s, and in the early 1980s was insufficient to compensate for the ever-growing deficit on the service account. The resulting deficit on the current account has to be financed by capital inflows.

Canada has always relied heavily on foreign capital, and from 1950 to 1978, just over 20 per cent of its total net investment came from foreign sources.[12] (This figure would be much higher if the re-investment of profits generated by foreign-owned companies were included.) Although there are signs of some diversification, most of the money needed is raised in the United States. The very close linkages between the Canadian and American capital markets are well known; in fact the New York market is used as a financial intermediary by Canadian lenders who wish to hold liquid assets and by Canadian borrowers who need long-term loans. Turning to Quebec, we see a similar reliance on foreign capital. Quebec governments have established a tradition of raising a larger share of their capital needs outside the country than do other provincial governments. In the mid-1970s, 45 per cent of Quebec's provincial and hydro debt was in foreign bonds, and borrowings in yen and Eurocurrencies are continuing this policy into the 1980s.

Dependence on foreign capital is likely to continue well into the future. There is no likelihood in the near term that Canada will generate a large enough trade surplus to compensate for the deficit on the service account. This means that Canadian interest rates must be attractive enough to prevent short-term money from flowing out of the country. The balance-of-payments deficit thus limits Canada's monetary-policy options. At the same time very large amounts of equity or long-term debt financing will be required in the 1980s for 'lumpy' energy projects such as oil-sands development and the exploitation and transportation of frontier oil and gas. Moreover multinational corporations will continue to play a major role in Canadian capital formation, usually in terms of their reinvestment of locally generated profits. Canada, therefore, also has to maintain a relatively attractive climate for new and already established investors.

Reliance on multinational corporations for investment and job creation is a well known aspect of Canada's economic openness to the outside world. More recently the importance of parent companies' foreign-located product-design and engineering capacity has been demonstrated.[13] Not only industrial invention and innovation, but also product development and adaptation, which are more important commercially, usually take place abroad. The results of what is, in fact, 'on-going invention' tend to be transferred 'ready made' to Canadian subsidiaries. Consequently the latter are not equipped to undertake their own product development, yet can under-sell independent Canadian producers who have to carry the costs of product engineering.

Foreign-owned firms control a smaller share of Quebec's industry than of Ontario's, but many of them ship their output from Quebec in crude or semi-processed form. The level of their activity thus depends entirely on external demand, and they probably generate relatively fewer local purchasing and subcontracting jobs than do foreign-owned firms in Ontario. However, even if more local processing took place in Quebec, that province's economy would still depend heavily on international demand for forest products, asbestos and aluminum products, iron ore, steel, and other resource-based goods.

With their continued dependence on foreign loans (often denominated in the lenders' currencies), on multinational corporations, and on a limited range of export commodities and markets, Canada and Quebec are clearly very vulnerable to changes in the world economy. Some of the trends in the early 1980s suggest that Quebec, or perhaps even Canada as a whole, is in danger of 'peripheralization'. The consolidation of the three big trading blocs, the pressure of oil prices on Japanese and European trade balances, and the shift of demand in the United States to the southwestern regions of the country, all suggest that sales of Canadian — particularly Eastern Canadian — goods will require ever greater efforts.

Perceptions of Canada's and Quebec's Roles in the World Economy

The preceding paragraphs have painted a pessimistic picture. Yet Canada and Quebec undoubtedly enjoy enormous potential advantages in terms of future world demand for both goods and services. One reason for the apparent contradiction between Canada's and Quebec's extreme vulnerability to changes in external economic conditions and the fact that both regions are well endowed to take advantage of such changes, is that Canadians, as well as foreigners, perceive Canada's role in the international economy in restricted terms.

There are two sides to this question: foreign and domestic perceptions. Although each could be the subject of a separate study, we shall simply review very briefly, first, foreigners' perceptions of Canada and Quebec, and secondly Canadians' and Quebecers' own perceptions.

At present Quebec and the rest of Canada offer only moderate attractions to foreign corporations looking for investment opportunities in the manufacturing sector. Canadian and Quebec domestic markets are small and in danger of being 'balkanized' by interprovincial trade barriers such as provincial governments' preferential purchasing policies. Wages and overheads are relatively higher than in other comparable locations. In fact, in most manufacturing sectors, Quebec and Canada are badly placed in the so-called 'product life cycle'.

Fortunately we can qualify this discouraging picture in two ways. First, in the natural resource area, investment in Canadian hydro-electric development is still considered both safe and profitable. Other energy sources, such as frontier oil and gas, and uranium, attract considerable foreign interest despite the high risks involved. Secondly Quebec and Canada are potentially attractive investment locations as a gateway to the American market. Japanese and European investors, and even investors from newly industrializing countries who believe that the Canadian market is easier to penetrate than the American market, may well be attracted to the Canadian locations by the various incentive programs offered by both levels of government. This factor may be important in outweighing the declining attractiveness of Canada for American manufacturing firms.

Canada still enjoys a 'good' international reputation, but its partners in the United States, as well as in the EC, are somewhat disillusioned, although for different reasons, with Canada's attempts to secure special deals in its international economic affairs. Many Canadians hope for another sectoral trade arrangement with the United States on the lines of the auto pact. Such an arrangement would bring Canadians the efficiency gains of international specialization without exposing them to American domination. But influential groups in the United States are far from satisfied with the results of the auto pact, particularly with the way Canadians have interpreted the safeguard clauses, and it seems most unlikely that any other limited sectoral-trade packages would rally the support of the American government.

In 1976 Canada negotiated a 'contractual link', or framework agreement, with the EC. The Community generally concludes special institutional agreements only with developing countries, principally former colonies of EC-member countries, or with neighbouring Mediterranean countries likely either to join the Community later on or to suffer from its preferential trade arrangements. The agreement with Canada was thus in the nature of a special favour, and its 'granting' was, of course, influenced by Canada's resource potential; but it has borne little fruit to date, and some Community officials think that nothing has been gained by such an initiative, while an unwelcome precedent has been set for other developed countries to request special contractual links with the EC.

Although Japan and newly industrializing countries in Asia are also clearly interested in Canada's energy and environmental advantages, Canadians have so far been unable to establish their country as a preferred investment location for Japanese firms. At the same time Canada's protective stance toward manufactured exports of newly industrializing Asian countries does not endear it to many of these nations.

Foreign businesses and governments seem to show much the same attitudes toward Quebec as toward Canada as a whole. It is clear, however, that there is no obvious economic advantage for any major power in negotiating a formal trading agreement with an independent Quebec unless the latter is assured free entry into markets in the rest of Canada and, preferably, into American markets as well.[14]

When we turn to consider Canadians' and Quebecers' awareness of economic opportunities abroad, it appears that, by and large, decision makers in the private sector continue to focus on the American market almost all the attention they can spare from domestic preoccupations. A combination of realism and inertia has made these people little inclined to invest in developing markets in Europe and the newly industrializing countries. As a result the efforts of the federal government under successive Liberal administrations to stimulate diversification of Canadian trade and develop the Third Option, which included closer links with the EC, have gone largely unnoticed.[15]

Furthermore, in the early 1980s, there seems to be much less hostility in English Canada than there was in the early 1970s towards the idea of negotiating some form of general bilateral trade agreement with the United States. The complex evolution of public opinion that underlies this assertion cannot be analysed here. It is merely advanced to support the hypothesis that Canadian policy makers are likely to continue to turn first to other North Americans for help in solving the economic issues of the 1980s rather than to search actively for ways to reduce their dependence on their southern neighbour.

The Government of Quebec has taken a series of steps away from almost exclusive dependence on traditional English-speaking partners in order to diversify its trade and economic relations. But these initiatives will take a long time to bear fruit. On the other hand, an economic association among Quebec, the rest of Canada, and the United States could be a very attractive long-term goal for Quebec nationalists since it would offer access to American technology and economies of scale while safeguarding apparent political sovereignty and assuring Canadian support in negotiating special phased integration of Quebec manufacturing into the American market. Political circumstances, however, prevent any active support for such a long-term strategy at this time.

It thus appears that there is scope for a widening of both Canadians' and foreigners' perceptions of Canada's potential contribution to world trade. While Canada is a valued and reliable trade partner, it is still considered almost exclusively as a supplier of raw or semi-processed goods. Many of its potential trade partners believe that it is already integrated into a *de facto* North American trade area, a belief Canadians themselves have not worked very hard to dispel. Constitutional options that may be chosen over the next few years will inevitably affect our trading partners' perceptions of Canada and of Quebec. They may also influence Canadians' and Quebecers' commercial policies.

Economic Policy and International Economic Relations

At the beginning of this paper, I stated that domestic policies are one of a series of factors that, together with world demand and domestic supply, shape a country's external economic relations. Given the context described above, it is clear that those responsible for economic policy making in Canada will be faced with difficult decisions in international fields during the 1980s. In addition measures in fields other than those usually associated with international trade and investment also affect a country's economic relations with the rest of the world. Policies relating to stabilization, redistribution, and development, at both the federal and provincial levels, can have a major impact on Canada's external transactions.

The choice of a particular constitutional arrangement will have repercussions on economic policy in all these fields, but it would be impossible to review the range of possible modifications in a paper of this kind. Instead, in this section we shall consider two interrelated areas of economic policy that are of concern to Canadians and Quebecers: the future competitiveness of economic activity in the Canadian economic space and the scope for implementing independent policies that the Canadian and Quebec governments can realistically hope to maintain or extend. Both areas will be affected by significant constitutional change, and both are at the heart of Canada's international economic relations in the 1980s.

International Competitiveness

Whether one looks at the short or the medium term, the international competitiveness of the Canadian and Quebec economies is in doubt. The depreciation of the Canadian dollar since the fourth quarter of 1976 has partly obscured the problem, but virtually all analysts are aware that our economies are badly posed to react to expected developments in the late twentieth century and that, despite our inherent strengths, we continually find ourselves negotiating from a position of weakness. Among the multitude of factors that have been advanced to explain or justify Canada's failure to establish broadly based competitive activities, the following seem most relevant to our theme:

- Traditional reliance on comparative advantage based solely on natural resources endowments.
- The cost burden accumulated by attempting to supply a small population spread over a very large and inhospitable territory, using as high a proportion of domestically produced goods as is politically acceptable. (This is another way of describing the National Policy.)
- An inefficient combination of production factors — particularly management — in manufacturing. Attention has been drawn to the inefficiency that results from excessive product diversification within Canadian plants, in contrast to the criticism often directed at Canadian companies that they suffer from an excessive number of plants.[16] This inefficient use of production factors in manufacturing has been attributed to the legacy of the National Policy, to the lack of aggressiveness of Canadian management, and to the constraints imposed by foreign ownership. An aspect of this third factor that is coming increasingly to the fore is multinational corporations' refusal to give their Canadian subsidiaries 'world product markets', that is, permission and encouragement to develop world-size capacity and expertise in certain lines. (The problem is that the ensuing export from Canada of those products would likely compete with exports or domestic shipments from the companies' other plants, including those in their home locations.)
- Uncompetitive costs for a labour force that is, on average, not as well educated as its American and Japanese counterparts and less mobile than the former. While wage parity with the United States had been reached in many sectors before the depreciation of the late 1970s, the labour-productivity gap is still significant.[17]
- Excessive government intervention in the economy, including regulation, counter-productive support programs, and balkanization of the Canadian common market by the creation of non-tariff barriers to interprovincial trade.
- The continuing attraction of the United States, which leads to the emigration of many of Canada's most dynamic and innovative economic agents.

There is now widespread awareness of the uncompetitive nature of much economic activity in Canada and of the country's vulnerability in its international relations, but the solutions to the problems remain elusive in the country as a whole and in Quebec. During the 1970s national and sectoral industrial strategies were proposed, and several attempts were made to develop structural policies to improve the competitiveness of Canadian industry.[18] Without entering into the specifics of the ensuing analysis, I suggest that there was general agreement on the need to improve both the quality and the productivity of labour, of management, and of capital inputs. Areas seen to require particular attention were skilled-labour training, including interprofessional mobility; investment in new plant and equipment; and the export performance of Canadian and Quebec firms. These are all areas on which constitutional change would impinge.[19]

Policy Independence

The scope for implementing independent economic policies has been narrowing in all countries, including the United States, since 1973. Growing interdependence is made apparent by the growth of the Euro-dollar and of Euro-bond markets, by repercussions of the international oil shortages, and by the vain attempts of various governments to shield their economies from the pervasive effects of stagflation. Since Canada and, *a fortiori*, Quebec, should it become a separate state, are relatively small units in the international economy, their policy independence will inevitably be limited unless they pursue an unlikely and extremely costly policy of autarky.

Nonetheless, Canada and Quebec can both choose to maximize their relative liberties in order to pursue their objectives consistently despite the ups and downs of the world market, and there is more likelihood of such a choice succeeding if the economy in question satisfies certain minimum conditions. In the Canadian and Quebec contexts, these minimum conditions would most probably include:

- Strength, in terms of sustained world competitiveness, in at least one industry in each of the major sectors: resources (for example grain, forest products), manufacturing (for example public transportation and telecommunications equipment), and services (for example communications, consulting engineering)

- A greater diversification of foreign sales of goods and services
- An operational consensus on economic objectives and on the means required to implement them among the major economic agents and decision makers. These include governments (at several levels, if necessary), multinational firms, domestically owned businesses, and a broadly based group of labour leaders.

These elements far from exhaust the list of means by which policy independence could be increased, but they are among the most important, and the impact of different constitutional options on each is of considerable interest to our theme.

Constitutional Options and International Economic Relations

Both Quebec and Canada as a whole are threatened with economic peripheralization. Both are exceptionally dependent on economic events and decisions outside their borders, and both need to take effective measures to strengthen their comparative advantages in their most successful export lines and to establish new economic activities in which they can compete in the world market. Both need to be able to rally general support behind consistent attempts to develop their potential advantages. How would the constitutional options envisaged affect the two societies' international economic relations?

As I have already stressed, this paper does not aim to present any formal modelling exercise to analyse the repercussions on Canada's and Quebec's external transactions of the different constitutional options under consideration. In the section that follows, I attempt to draw some general conclusions based on the preceding discussion. A summary definition of each of the options is provided to avoid misunderstanding.

Classical Federalism

This would be a revised version of the existing Canadian Confederation, characterized by an equal, or 'symmetrical', division of powers among the constituent provinces or regions. Hence each of the constituent parts would enjoy basically identical powers, at least in the economic sphere. The resulting federation could be more centralized, as centralized, or less centralized than Confederation as we know it. We shall therefore consider the following:

- A federal system in which economic decision making is more centralized than it was at the time of the Quebec referendum
- A federal system in which all the provinces have approximately the same amount of control over economic decision making that they enjoyed in the late 1970s
- A less centralized federation in which a greater element of economic decision making devolves to all of the provinces in such areas as control over sales of natural resources, income security (including pensions), labour-force policy, and foreign investment review.

Classical federalism with greater centralization in economic decision making

Such an option appeared politically unfeasible throughout the 1970s and was therefore ignored by most commentators. The early years of the 1980s have, however, seen a number of federal moves that suggest that Ottawa is trying to recover ground lost to the provinces in the 1960s and 1970s. Interprovincial trade, health and welfare, education and manpower policy, regional development, and natural resources are areas in which, to varying degrees, the federal government has recently reaffirmed its concern and its presence. It remains to be seen whether this effort will be sustained and, if so, whether it will lead to a significant change in the sharing of decision making in economic matters. The signs are numerous enough, however, to warrant a brief discussion of increased centralization that would have seemed unnecessary a few years ago.

Increased centralization in decision making would affect international economic matters differently from domestic economic concerns. This is, therefore, an hypothesis in which international issues have to be distinguished very clearly from domestic ones, despite the fact that Canada's international economic stance is, as we have seen, strongly influenced by domestic decisions.

A more centralized federation would most probably be better able than a decentralized one to promote the competitiveness of Canadian output and sales. Strategies for investment, manpower training, and production could be adopted with greater likelihood of their bearing fruit.[20] Greater policy independence could also be obtained if there were one clearly accepted 'senior government' with generally recognized responsibility for building a consensus between management and labour and for thinking through the country's export strategy. The Canadian position would be more visible, better articulated, and thus clearer to our partners. Canada would therefore stand a better chance of marshalling its strengths in the international economic community.

This appreciation naturally supposes that greater centralization is accepted by the provinces and that these do not combat it with offsetting measures in order to reassert their powers. The likelihood of their reacting favourably or unfavourably depends largely on the respective weights they give to achievement of economic goals on the international and on the domestic scenes. Considerations of individual welfare and regional identity may militate against centralization up until the moment when international competitiveness becomes an overriding consideration since, without it, interpersonal and interregional redistribution is impossible.

Classical federalism with the present degree of economic centralization

If such a régime were truly acceptable to the parties involved, that is, the ten provincial governments and the federal government, the former would cease trying to whittle away remaining federal constraints on their freedom of action. At the same time Ottawa would not attempt to obtain new, or to recover lost, powers as it has often done in the past. Under these circumstances we could expect a number of positive developments relevant to Canada's international economic relations.

First, there would be scope for improvement in the mechanisms of economic decision making as constitutional conflicts ceased to preoccupy or confuse decision makers in government and in the private sector. Improved decision making would have an effect on structural measures, as well as on measures to promote stabilization. There would be more likelihood of governments, management, and labour adopting a consistent series of industrial policies, including modernization of the manufacturing sector, coherent and efficient use of all forms of energy across the country as they became available, and joint government/private-sector export strategies.

Secondly there would be a halt to the balkanization of the Canadian common market, which would increase the attractiveness of Canadian locations for foreign investors and would encourage industrial specialization within existing firms. The combined effects of improvements in decision making and a guaranteed Canada-wide market would give Canadians an opportunity to combat the causes of poor international performance enumerated above and improve productivity and export structure.

Thirdly a confirmation of the Canadian government's current responsibilities in the economic sphere would assure a continued, unequivocal, Canadian presence in those international forums such as international grain- and law-of-the-sea negotiations in which the country carries some weight. It would also allow the federal government to negotiate with foreign partners, particularly the United States, on a firm basis, without fear of competition or obstruction from provincial administration.

These gains would not be insignificant, given the international context in the 1980s and the economic problems Canada faces. Thus this brief summary suggests that a *status quo* Confederation offers Canada opportunities for improving its competitiveness and making good use of its scope for economic decision making. However, an apparently painless solution of current constitutional problems could also yield negative results in these very same fields. If Canadians are persuaded that their present common market works efficiently enough to generate an acceptable level of economic return to its participants, they may choose to ignore the major outstanding problems arising from lack of international competitiveness and unnecessary dependence and, hence, vulnerability. In this case their external position is likely to deteriorate.

It must also be pointed out that while Quebec might benefit from opportunities to improve economic competitiveness under the proposed régime, it would not gain any greater scope for economic decision making, unless indirectly to the extent that major efficiency gains happened to take place in Quebec-controlled sectors and thus gave that province greater weight in Canada's international economic policy making.

Classical federalism with less centralization of economic decision making

This constitutional option could conceivably stimulate economic activity within the various provinces or regions and hence induce new enterprise and innovation. From the international point of view, however, its over-all effects promise to be negative since this option does not appear to offer any improvement in

Canadian productivity or to address the causes of Canada's failure to achieve international competitiveness. More specifically, with decreased centralization, circumstances would likely evolve as follows.

- There would be increased balkanization of an already small Canadian market, which would either deter new investment or encourage manufacturers to maintain a number of sub-optimal-sized plants to satisfy requirements for local content and employment.
- There would be increased difficulty in adopting Canada-wide economic policies in either the macroeconomic or the industrial development fields.
- Provincial governments would be encouraged to outbid one another to attract investment and to conclude special supply deals with foreign firms and foreign governments.
- Canada would face constant problems in maintaining a united front in international economic negotiations, and as a result these might well be conducted on an incremental rather than on an over-all basis, with the consequent danger of a sell-out of Canada's bargaining advantages.

From the point of view of a given province, decentralized symmetrical federalism may look more attractive. Each province would have greater opportunities for negotiating with foreign governments, establishing guide-lines for multinational corporations, and drawing up investment-incentive packages. It is far from certain, however, that the gains would outweigh the losses and lead to real increases in policy independence or in the diversification of provincial export patterns.

Special Status for One or More Provinces

This is basically an 'asymmetrical' federalism in which certain constituent parts of the federation enjoy special rights or powers. Given the relatively decentralized way in which Confederation now operates and the modest scope of the Quebec government's sovereignty-association proposal in the economic field, it is difficult to differentiate special status from sovereignty-association in terms of control over economic policy.[21] I shall therefore not discuss this option here.

Nonetheless, it should be remembered that in political and diplomatic terms, the distinction between these two options is of major importance. Foreign governments and investors might react in one way to a Canadian province enjoying special status and in another way to a 'sovereign Quebec associated with Canada', even if the Quebec government exercised very similar economic powers in both instances. I refer readers to other papers in this collection that deal with the political and diplomatic issues.

A Sovereign Independent Quebec

A sovereign independent Quebec would have no formal economic linkages with any other countries or with the former Canadian provinces, other than its obligations under the GATT, the International Monetary Fund (IMF), the World Bank, and any other international organizations such as the Inter-American Development Bank or the Organisation for Economic Cooperation and Development (OECD) that it chose to join. However, it could, of course, attempt to negotiate a form of economic association with one or more of its trading partners.

In the long run a sovereign Quebec with no formal trade association with the rest of Canada could undoubtedly improve its present level of international competitiveness and attain a degree of economic independence comparable to that enjoyed by other small industrialized countries. Sweden and Switzerland are examples frequently referred to. It is not implausible that the conditions mentioned above for improving competitiveness and optimizing national decision making would be better met, from Quebec's point of view, in a small unitary state than in a slow-moving balkanized federation. A smooth transition to independence would permit an improvement in the government/private-sector interface, a reduction in overhead costs arising from Confederation, and an opportunity to adopt better focused industrial policies. There would, however, be no quick way to diversify Quebec's export pattern, and separation from Canada would narrow even further the range of export goods on which Quebecers would have to depend to pay for their imports.

Furthermore, although accession to sovereign status would provide an opportunity to mobilize the energy and goodwill of diverse economic groups for a concerted industrial strategy, it could also lead to increased pressures within the new nation. A strong sense of national purpose and enterprise is a necessary, but not a sufficient, condition for a significant improvement in Quebec's international competitiveness. A major depreciation of the local currency would probably be needed also, while the required industrial transformation was taking place, to boost the competitiveness of Quebec products in world markets and thus compensate for the probable loss of sales to the rest of Canada. But such a measure, entailing at least a temporary fall in real incomes, would be difficult to implement both for political reasons and because of the very close linkages between capital markets across North America. Consequently a decision to create a national Quebec currency not pegged to an already established currency would probably entail devoting an unacceptably large share of national resources to maintaining confidence in the new money. This would hamper the pursuit of both industrial efficiency and policy independence.

An alternative strategy would be for Quebec to seek a new trading partner. The United States is the only plausible candidate. If such an association proved politically feasible and were negotiated, its effects would obviously be far reaching. While the cost competitiveness of economic activity in Quebec would very probably be improved through economies of scale and more immediate access to best-practice technology, the Government of Quebec would suffer a very severe loss of control over economic policy. The Quebec economy would also become increasingly peripheralized unless it could attract European and other foreign investors on the strength of its right of entry to the American market.

It is conceivable that Canada's nine remaining provinces could work together to improve their international competitiveness, but in the absence of any strong political or psychological catalyst, an over-all weakening of their joint bargaining power and level of economic efficiency seems a more probable sequence of events after the secession of Quebec.

Sovereignty-Association between Quebec and the Rest of Canada

Sovereignty-association as proposed by the Government of Quebec in 1979 entailed sharing a common market (with some exceptions) and a common currency with the rest of Canada. However, legislative powers within the two jurisdictions, including the right to tax, would be restricted to their respective governments.[22] If accepted and implemented in good faith by all parties, this régime could have a number of positive consequences in the areas that concern us.

There could be a catalysing effect on Quebec decision makers at all levels that would allow certain hard, but necessary, decisions to be taken as part of the response to the challenge of assuming self-determination. At the same time there would be scope for an improvement of economic decision making within Quebec. Freed from the wastage and irritation of overlapping jurisdictions and unable to continue to attribute the results of mistaken policies to another level of government, policy makers would be able to work to improve productivity and international competitiveness in selected industrial sectors. At the same time a treaty of association between Quebec and the rest of Canada would probably halt the erection of interprovincial non-tariff barriers. Many of these have taken root contrary to the spirit, but not to the letter, of the British North America Act. The new treaty would necessarily illuminate what is now a grey area. While it would inevitably introduce rigidities into relationships between the two partners, it would also, presumably, set up mechanisms for the policing of such barriers, and its example might even persuade governments in the rest of Canada to roll back some of their own interprovincial barriers.

Participation in a Canada-Quebec common market would allow Quebec to continue to benefit from a protected market for its own goods, but the need to diversify its exports would be more urgent than within Confederation since, in the absence of interprovincial redistribution mechanisms, Quebec would not share, as it does at present, in the benefits of strong demand for Canadian exports from the other nine provinces.

However, even if sovereignty-association were implemented in good faith by both partners, certain negative consequences for Quebec, as well as for the rest of Canada, could hardly be avoided. One would be an increasing peripheralization of Quebec as investors insured themselves against the risks of an unknown régime by investing in the 'Canadian' areas of the common market. Another would be the probability of a deterioration in both the process and the content of economic decision making north of the American border at the three main points, that is, at interprovincial, interassociational, and international levels.

At the interprovincial level Quebec's absence would not necessarily facilitate intergovernmental relations in the rest of Canada. While the process might be improved in the absence of the bilingual-bicultural constraint, there is no reason to suppose that the inherent conflicts of interests among province builders and between 'have' and 'have-not' regions would be attenuated.

An association of two equal sovereign states would likely lead to a series of impasses or to the economic domination of one by the other.

On the international scene Quebec-Canada's bargaining power would almost certainly be weaker than that enjoyed by Canada at present both because of the uncertainty about the stability of the association in the minds of its trading partners and because of the difficulty in maintaining a single negotiating position on a number of important issues.

A final consideration is that while Quebec would certainly gain some policy independence, the scope for implementing decisions significantly different from those taken in the other competing regions of North America would be narrower than many people realize. A common market and a common currency zone require a fairly high degree of harmonization of fiscal and industrial policies. For example, if goods can move freely from one region to another, and wages are the same in each, it may be counter-productive for one region to impose stricter controls on foreign investment or to require a higher level of local content in manufacturing than do the other regions.

Concluding Comments

It is obviously impossible to predict the outcome of any of the constitutional options in terms of Canada's or Quebec's international economic relations. All I have attempted are a survey of the different forces shaping the two societies' external economic relations and suggestions about ways in which constitutional changes would affect these forces.

Constitutional changes taking place in the Canadian economic space would have almost no impact on the first series of factors that we have called 'world demand'. The second series of factors, 'domestic supply', includes the various facets of Canada's and Quebec's existing international trading relationships. A pattern of resource-based exports, dependence on capital imports and multinational companies, and current perceptions of Canada's and Quebec's role in the world economy are major elements of the picture. While constitutional change would not alter resource endowments, it could modify control over natural resources. Probably more important would be its impact on attitudes toward Canada and Quebec among foreign clients and investors. It is widely believed that constitutional modifications tending to reduce the power of the federal Government of Canada or to create a second sovereign nation would be viewed negatively by the country's foreign trading and investment partners. While this is an over-simplification, there is considerable basis for such an argument.

If we turn to the third series of factors, that is, domestic economic policies, we can see that constitutional change could strongly influence the kinds of policies adopted within the Canadian economic space and the effectiveness with which they are implemented. Both a reaffirmation of current federalism and a shift to sovereignty-association could provide the catalyst for major improvements in the use of human resources for capital deepening and for export diversification.

The relative weight attributed to domestic and to external factors in determining Canada's international economic relations is thus of crucial importance. If the country's international relations are believed to be exclusively determined by factors outside Canadian and Quebec control, then the impact of significant constitutional change is likely to be judged as negative in the international field, and Canadians will have to bear its costs in terms of reduced confidence on the part of foreign partners. If, on the other hand, domestic factors such as improvements in decision making and in the quality and mobility of the labour force can have a significant influence on Canada's external relations, then constitutional changes may either strengthen or weaken the country's international position, depending on whether these factors have positive or negative effects on the key variables I have discussed.

Notes

1. This is not to deny the obvious influence of political factors; for a discussion of these factors, readers are referred to other papers in this collection.

2. Rodney de C. Grey, *Trade Policy in the 1980s: An Agenda for Canadian–U.S. Relations*, Policy Commentary No. 3 (Montreal: C.D. Howe Institute, 1981).

3. Floating exchanges have also been important in bringing this about.

4. This situation had already become apparent before the conclusion of the MTNs through the way in which small countries, such as Sweden and Canada, were singled out for reprobation by the Textile Surveillance Board (TSB), while more important offenders, such as EC members (France and Britain) and the United States, pursued similar protectionist measures unhampered by the TSB.

5. Solomon Fabricant, *The Economic Growth of the United States: Perspective and Prospective*, Canada–U.S. Prospects Series (Montreal: C.D. Howe Institute, 1979).

6. See Grey, *Trade Policy in the 1980s*.

7. United Nations, GATT Secretariat, *Trade Liberalism, Protectionism and Interdependence*, GATT Studies in International Trade, No. 5 (Geneva, 1977).

8. Wendy Dobson, *Exports to Developing Countries: An Opportunity for Canada*, Observation No. 20 (Montreal: C.D. Howe Institute, 1979).

9. Pierre-Paul Proulx, *et al.*, *Étude des relations commerciales Québec–U.S.A., Québec–Canada; options et impacts; contraintes et potentiels* (Québec: Éditeur officiel, 1978).

10. Canada, Statistics Canada, External Trade Division, *Summary of External Trade* (Ottawa, 1981 and *Current Economic Analysis*, October 1981).

11. Carmine Nappi, *Structure of Quebec's Exports* (Montreal: C.D. Howe Institute, 1978).

12. Robert M. Dunn Jr., *The Canada–U.S. Capital Market: Intermediation, Integration, and Policy Independence*, Canada–U.S. Prospects Series (Montreal: C.D. Howe Institute, 1978).

13. Pierre Bourgault and Harold Crookell, "Commercial Innovation in Secondary Industry," in *Business Quarterly* 44 (Autumn 1979): 56–64.

14. See, for example, Kimon Valaskakis, *«L'option Europe»: Analyse de la plausibilite d'une association Québec/Canada/Europe* (Québec: Éditeur officiel, 1978).

15. The Third Option was formulated in the Department of External Affairs paper, *Canada–United States: Options for the Future*, in 1972 as an alternative either to closer integration with the United States or to a continuation of the *status quo*. While the federal government has had little encouragement for its contractual link with the EC from the private sector, it has itself alienated goodwill in EC circles by apparently refusing to consider seriously the competitive bids European tenderers submitted for military aircraft in the late 1970s.

16. Donald J. Daly, "Canada's Comparative Advantage," Discussion Paper No. 135 (Ottawa: Economic Council of Canada, 1979).

17. *Ibid.*

18. For a discussion of attempts to conceptualize and implement industrial strategy in the 1970s, see Richard D. French, *How Ottawa Decides Planning and Industrial Policy-Making, 1968–1980* (Ottawa: James Lorimer for Canadian Institute for Economic Policy, 1980).

19. An example of the way in which constitutional considerations impinge on economic policies is provided by the provinces' reaction to the federal government's National Training Program announced in late 1981, to improve skilled-manpower training. Education and hence training are provincial responsibilities, but information on future needs and resources for programs may only be available country wide.

20. At present it is extremely difficult to draw up and implement any extensive industrial strategy for Canada. There is even doubt if it is constitutionally possible to do so. See Richard Simeon, "Federalism and the Politics of an Industrial Strategy," in Science Council of Canada, *The Politics of an Industrial Strategy: A Seminar* (Ottawa: Minister of Supply and Services Canada, 1979), pp. 5–43, and Michael Jenkin, "The Prospects for a New National Policy," *Journal of Canadian Studies* 14 (Fall 1979): 126–41.

21. This does not imply that the two constitutional options would yield the same economic results. There are, of course, very significant differences, particularly from a distributional point of view, but these do not necessarily affect external economic relations.

22. Québec, Conseil exécutif, *Québec–Canada: A New Deal* (Quebec: Éditeur officiel, 1979).

The Author

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Appendix

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CANADA

THE CONSTITUTION ACT, 1982

LA LOI CONSTITUTIONNELLE DE 1982

CONSTITUTION ACT, 1982

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion;

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(*c*) freedom of peaceful assembly; and

(*d*) freedom of association.

Democratic Rights

Democratic rights of citizens

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Maximum duration of legislative bodies

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members.

Continuation in special circumstances

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legisla-

LOI CONSTITUTIONNELLE DE 1982

PARTIE I

CHARTE CANADIENNE DES DROITS ET LIBERTES

Attendu que le Canada est fondé sur des principes qui reconnaissent la suprématie de Dieu et la primauté du droit :

Garantie des droits et libertés

Droits et libertés au Canada

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

Libertés fondamentales

Libertés fondamentales

2. Chacun a les libertés fondamentales suivantes :

a) liberté de conscience et de religion;

b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;

c) liberté de réunion pacifique;

d) liberté d'association.

Droits démocratiques

Droits démocratiques des citoyens

3. Tout citoyen canadien a le droit de vote et est éligible aux élections législatives fédérales ou provinciales.

Mandat maximal des assemblées

4. (1) Le mandat maximal de la Chambre des communes et des assemblées législatives est de cinq ans à compter de la date fixée pour le retour des brefs relatifs aux élections générales correspondantes.

Prolongations spéciales

(2) Le mandat de la Chambre des communes ou celui d'une assemblée législative peut être prolongé respectivement par le Parlement ou par la

tive assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

Annual sitting of legislative bodies

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.

Mobility Rights

Mobility of citizens

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Rights to move and gain livelihood

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(*a*) to move to and take up residence in any province; and

(*b*) to pursue the gaining of a livelihood in any province.

Limitation

(3) The rights specified in subsection (2) are subject to

(*a*) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(*b*) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Affirmative action programs

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Legal Rights

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof

législature en question au-delà de cinq ans en cas de guerre, d'invasion ou d'insurrection, réelles ou appréhendées, pourvu que cette prolongation ne fasse pas l'objet d'une opposition exprimée par les voix de plus du tiers des députés de la Chambre des communes ou de l'assemblée législative.

Séance annuelle

5. Le Parlement et les législatures tiennent une séance au moins une fois tous les douze mois.

Liberté de circulation et d'établissement

Liberté de circulation

6. (1) Tout citoyen canadien a le droit de demeurer au Canada, d'y entrer ou d'en sortir.

Liberté d'établissement

(2) Tout citoyen canadien et toute personne ayant le statut de résident permanent au Canada ont le droit :

a) de se déplacer dans tout le pays et d'établir leur résidence dans toute province;

b) de gagner leur vie dans toute province.

Restriction

(3) Les droits mentionnés au paragraphe (2) sont subordonnés :

a) aux lois et usages d'application générale en vigueur dans une province donnée, s'ils n'établissent entre les personnes aucune distinction fondée principalement sur la province de résidence antérieure ou actuelle;

b) aux lois prévoyant de justes conditions de résidence en vue de l'obtention des services sociaux publics.

Programmes de promotion sociale

(4) Les paragraphes (2) et (3) n'ont pas pour objet d'interdire les lois, programmes ou activités destinés à améliorer, dans une province, la situation d'individus défavorisés socialement ou économiquement, si le taux d'emploi dans la province est inférieur à la moyenne nationale.

Garanties juridiques

Vie, liberté et sécurité

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce except in accordance with the principles of fundamental justice.

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

Detention or imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention

10. Everyone has the right on arrest or detention

(*a*) to be informed promptly of the reasons therefor;

(*b*) to retain and instruct counsel without delay and to be informed of that right; and

(*c*) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Proceedings in criminal and penal matters

11. Any person charged with an offence has the right

(*a*) to be informed without unreasonable delay of the specific offence;

(*b*) to be tried within a reasonable time;

(*c*) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(*e*) not to be denied reasonable bail without just cause;

(*f*) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(*g*) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

droit qu'en conformité avec les principes de justice fondamentale.

Fouilles, perquisitions ou saisies

8. Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

Détention ou emprisonnement

9. Chacun a droit à la protection contre la détention ou l'emprisonnement arbitraires.

Arrestation ou détention

10. Chacun a le droit, en cas d'arrestation ou de détention :

a) d'être informé dans les plus brefs délais des motifs de son arrestation ou de sa détention;

b) d'avoir recours sans délai à l'assistance d'un avocat et d'être informé de ce droit;

c) de faire contrôler, par *habeas corpus*, la légalité de sa détention et d'obtenir, le cas échéant, sa libération.

Affaires criminelles et pénales

11. Tout inculpé a le droit :

a) d'être informé sans délai anormal de l'infraction précise qu'on lui reproche;

b) d'être jugé dans un délai raisonnable;

c) de ne pas être contraint de témoigner contre lui-même dans toute poursuite intentée contre lui pour l'infraction qu'on lui reproche;

d) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;

e) de ne pas être privé sans juste cause d'une mise en liberté assortie d'un cautionnement raisonnable;

f) sauf s'il s'agit d'une infraction relevant de la justice militaire, de bénéficier d'un procès avec jury lorsque la peine maximale prévue pour l'infraction dont il est accusé est un emprisonnement de cinq ans ou une peine plus grave;

g) de ne pas être déclaré coupable en raison d'une action ou d'une omission qui, au moment où elle est survenue, ne constituait pas une infraction d'après le droit interne

(*h*) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

du Canada ou le droit international et n'avait pas de caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations;

h) d'une part de ne pas être jugé de nouveau pour une infraction dont il a été définitivement acquitté, d'autre part de ne pas être jugé ni puni de nouveau pour une infraction dont il a été définitivement déclaré coupable et puni;

i) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.

Treatment or punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Cruauté

12. Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

Self-crimination

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Témoignage incriminant

13. Chacun a droit à ce qu'aucun témoignage incriminant qu'il donne ne soit utilisé pour l'incriminer dans d'autres procédures, sauf lors de poursuites pour parjure ou pour témoignages contradictoires.

Interpreter

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Interprète

14. La partie ou le témoin qui ne peuvent suivre les procédures, soit parce qu'ils ne comprennent pas ou ne parlent pas la langue employée, soit parce qu'ils sont atteints de surdité, ont droit à l'assistance d'un interprète.

Equality Rights

Droits à l'égalité

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Égalité devant la loi, égalité de bénéfice et protection égale de la loi

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of

Programmes de promotion sociale

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou

race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Official Languages of Canada

Official languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

Official languages of New Brunswick

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

Advancement of status and use

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

Proceedings of Parliament

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

Proceedings of New Brunswick legislature

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

Parliamentary statutes and records

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

New Brunswick statutes and records

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

Proceedings in courts established by Parliament

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.

Langues officielles du Canada

Langues officielles du Canada

16. (1) Le français et l'anglais sont les langues officielles du Canada; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions du Parlement et du gouvernement du Canada.

Langues officielles du Nouveau-Brunswick

(2) Le français et l'anglais sont les langues officielles du Nouveau-Brunswick; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions de la Législature et du gouvernement du Nouveau-Brunswick.

Progression vers l'égalité

(3) La présente charte ne limite pas le pouvoir du Parlement et des législatures de favoriser la progression vers l'égalité de statut ou d'usage du français et de l'anglais.

Travaux du Parlement

17. (1) Chacun a le droit d'employer le français ou l'anglais dans les débats et travaux du Parlement.

Travaux de la Législature du Nouveau-Brunswick

(2) Chacun a le droit d'employer le français ou l'anglais dans les débats et travaux de la Législature du Nouveau-Brunswick.

Documents parlementaires

18. (1) Les lois, les archives, les comptes rendus et les procès-verbaux du Parlement sont imprimés et publiés en français et en anglais, les deux versions des lois ayant également force de loi et celles des autres documents ayant même valeur.

Documents de la Législature du Nouveau-Brunswick

(2) Les lois, les archives, les comptes rendus et les procès-verbaux de la Législature du Nouveau-Brunswick sont imprimés et publiés en français et en anglais, les deux versions des lois ayant également force de loi et celles des autres documents ayant même valeur.

Procédures devant les tribunaux établis par le Parlement

19. (1) Chacun a le droit d'employer le français ou l'anglais dans toutes les affaires dont sont saisis les tribunaux établis par le Parlement et dans tous les actes de procédure qui en découlent.

Proceedings in New Brunswick courts

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

Procédures devant les tribunaux du Nouveau-Brunswick

(2) Chacun a le droit d'employer le français ou l'anglais dans toutes les affaires dont sont saisis les tribunaux du Nouveau-Brunswick et dans tous les actes de procédure qui en découlent.

Communications by public with federal institutions

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(*a*) there is a significant demand for communications with and services from that office in such language; or

(*b*) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

Communications entre les administrés et les institutions fédérales

20. (1) Le public a, au Canada, droit à l'emploi du français ou de l'anglais pour communiquer avec le siège ou l'administration centrale des institutions du Parlement ou du gouvernement du Canada ou pour en recevoir les services; il a le même droit à l'égard de tout autre bureau de ces institutions là où, selon le cas :

a) l'emploi du français ou de l'anglais fait l'objet d'une demande importante;

b) l'emploi du français et de l'anglais se justifie par la vocation du bureau.

Communications by public with New Brunswick institutions

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

Communications entre les administrés et les institutions du Nouveau-Brunswick

(2) Le public a, au Nouveau-Brunswick, droit à l'emploi du français ou de l'anglais pour communiquer avec tout bureau des institutions de la législature ou du gouvernement ou pour en recevoir les services.

Continuation of existing constitutional provisions

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

Maintien en vigueur de certaines dispositions

21. Les articles 16 à 20 n'ont pas pour effet, en ce qui a trait à la langue française ou anglaise ou à ces deux langues, de porter atteinte aux droits, privilèges ou obligations qui existent ou sont maintenus aux termes d'une autre disposition de la Constitution du Canada.

Rights and privileges preserved

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Droits préservés

22. Les articles 16 à 20 n'ont pas pour effet de porter atteinte aux droits et privilèges, antérieurs ou postérieurs à l'entrée en vigueur de la présente charte et découlant de la loi ou de la coutume, des langues autres que le français ou l'anglais.

Minority Language Educational Rights

Droits à l'instruction dans la langue de la minorité

Language of instruction

23. (1) Citizens of Canada

(*a*) whose first language learned and still understood is that of the English or French linguistic

Langue d'instruction

23. (1) Les citoyens canadiens :

a) dont la première langue apprise et encore comprise est celle de la minorité francophone ou anglominority population of the province in which they reside, or

(*b*) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

Continuity of language instruction

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

Application where numbers warrant

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(*a*) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(*b*) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Enforcement

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner

phone de la province où ils résident,

b) qui ont reçu leur instruction, au niveau primaire, en français ou en anglais au Canada et qui résident dans une province où la langue dans laquelle ils ont reçu cette instruction est celle de la minorité francophone ou anglophone de la province,

ont, dans l'un ou l'autre cas, le droit d'y faire instruire leurs enfants, aux niveaux primaire et secondaire, dans cette langue.

Continuité d'emploi de la langue d'instruction

(2) Les citoyens canadiens dont un enfant a reçu ou reçoit son instruction, au niveau primaire ou secondaire, en français ou en anglais au Canada ont le droit de faire instruire tous leurs enfants, aux niveaux primaire et secondaire, dans la langue de cette instruction.

Justification par le nombre

(3) Le droit reconnu aux citoyens canadiens par les paragraphes (1) et (2) de faire instruire leurs enfants, aux niveaux primaire et secondaire, dans la langue de la minorité francophone ou anglophone d'une province :

a) s'exerce partout dans la province où le nombre des enfants des citoyens qui ont ce droit est suffisant pour justifier à leur endroit la prestation, sur les fonds publics, de l'instruction dans la langue de la minorité;

b) comprend, lorsque le nombre de ces enfants le justifie, le droit de les faire instruire dans des établissements d'enseignement de la minorité linguistique financés sur les fonds publics.

Recours

Recours en cas d'atteinte aux droits et libertés

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

Irrecevabilité d'éléments de preuve qui risqueraient de déconsidérer l'administration de la justice

(2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve

that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General

Aboriginal rights and freedoms not affected by Charter

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(*a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(*b*) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

Other rights and freedoms not affected by Charter

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

Multicultural heritage

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Rights guaranteed equally to both sexes

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Rights respecting certain schools preserved

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

Application to territories and territorial authorities

30. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the

ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.

Dispositions générales

Maintien des droits et libertés des autochtones

25. Le fait que la présente charte garantit certains droits et libertés ne porte pas atteinte aux droits ou libertés — ancestraux, issus de traités ou autres — des peuples autochtones du Canada, notamment :

a) aux droits ou libertés reconnus par la Proclamation royale du 7 octobre 1763;

b) aux droits ou libertés acquis par règlement de revendications territoriales.

Maintien des autres droits et libertés

26. Le fait que la présente charte garantit certains droits et libertés ne constitue pas une négation des autres droits ou libertés qui existent au Canada.

Maintien du patrimoine culturel

27. Toute interprétation de la présente charte doit concorder avec l'objectif de promouvoir le maintien et la valorisation du patrimoine multiculturel des Canadiens.

Égalité de garantie des droits pour les deux sexes

28. Indépendamment des autres dispositions de la présente charte, les droits et libertés qui y sont mentionnés sont garantis également aux personnes des deux sexes.

Maintien des droits relatifs à certaines écoles

29. Les dispositions de la présente charte ne portent pas atteinte aux droits ou privilèges garantis en vertu de la Constitution du Canada concernant les écoles séparées et autres écoles confessionnelles.

Application aux territoires

30. Dans la présente charte, les dispositions qui visent les provinces, leur législature ou leur assemblée législative visent également le territoire du Yukon, les territoires du Nord-Ouest ou leurs autorités législatives compétentes.

appropriate legislative authority thereof, as the case may be.

Legislative powers not extended

31. Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter

Application of Charter

32. (1) This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Exception

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

Exception where express declaration

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Operation of exception

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

Five year limitation

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Re-enactment

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Non-élargissement des compétences législatives

31. La présente charte n'élargit pas les compétences législatives de quelque organisme ou autorité que ce soit.

Application de la charte

Application de la charte

32. (1) La présente charte s'applique :

a) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest;

b) à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature.

Restriction

(2) Par dérogation au paragraphe (1), l'article 15 n'a d'effet que trois ans après l'entrée en vigueur du présent article.

Dérogation par déclaration expresse

33. (1) Le Parlement ou la législature d'une province peut adopter une loi où il est expressément déclaré que celle-ci ou une de ses dispositions a effet indépendamment d'une disposition donnée de l'article 2 ou des articles 7 à 15 de la présente charte.

Effet de la dérogation

(2) La loi ou la disposition qui fait l'objet d'une déclaration conforme au présent article et en vigueur a l'effet qu'elle aurait sauf la disposition en cause de la charte.

Durée de validité

(3) La déclaration visée au paragraphe (1) cesse d'avoir effet à la date qui y est précisée ou, au plus tard, cinq ans après son entrée en vigueur.

Nouvelle adoption

(4) Le Parlement ou une législature peut adopter de nouveau une déclaration visée au paragraphe (1).

Durée de validité

(5) Le paragraphe (3) s'applique à toute déclaration adoptée sous le régime du paragraphe (4).

Citation

Citation

34. This Part may be cited as the *Canadian Charter of Rights and Freedoms*.

PART II

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

Recognition of existing aboriginal and treaty rights

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of "aboriginal peoples of Canada"

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

PART III

EQUALIZATION AND REGIONAL DISPARITIES

Commitment to promote equal opportunities

36. (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

(*a*) promoting equal opportunities for the well-being of Canadians;

(*b*) furthering economic development to reduce disparity in opportunities; and

(*c*) providing essential public services of reasonable quality to all Canadians.

Commitment respecting public services

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

Titre

Titre

34. Titre de la présente partie : *Charte canadienne des droits et libertés*.

PARTIE II

DROITS DES PEUPLES AUTOCHTONES DU CANADA

Confirmation des droits existants des peuples autochtones

35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

Définition de «peuples autochtones du Canada»

(2) Dans la présente loi, «peuples autochtones du Canada» s'entend notamment des Indiens, des Inuit et des Métis du Canada.

PARTIE III

PÉRÉQUATION ET INÉGALITÉS RÉGIONALES

Engagements relatifs à l'égalité des chances

36. (1) Sous réserve des compétences législatives du Parlement et des législatures et de leur droit de les exercer, le Parlement et les législatures, ainsi que les gouvernements fédéral et provinciaux, s'engagent à :

a) promouvoir l'égalité des chances de tous les Canadiens dans la recherche de leur bien-être;

b) favoriser le développement économique pour réduire l'inégalité des chances;

c) fournir à tous les Canadiens, à un niveau de qualité acceptable, les services publics essentiels.

Engagement relatif aux services publics

(2) Le Parlement et le gouvernement du Canada prennent l'engagement de principe de faire des paiements de péréquation propres à donner aux gouvernements provinciaux des revenus suffisants pour les mettre en mesure d'assurer les services publics à un niveau de qualité et de fiscalité sensiblement comparables.

PART IV

CONSTITUTIONAL CONFERENCE

Constitutional conference

37. (1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this Part comes into force.

Participation of aboriginal peoples

(2) The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.

Participation of territories

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of the conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

PART V

PROCEDURE FOR AMENDING CONSTITUTION OF CANADA

General procedure for amending Constitution of Canada

38. (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by

(*a*) resolutions of the Senate and House of Commons; and

(*b*) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces.

Majority of members

(2) An amendment made under subsection (1) that derogates from the legislative powers, the proprietary rights or any other rights or privileges

PARTIE IV

CONFÉRENCE CONSTITUTIONNELLE

Conférence constitutionnelle

37. (1) Dans l'année suivant l'entrée en vigueur de la présente partie, le premier ministre du Canada convoque une conférence constitutionnelle réunissant les premiers ministres provinciaux et lui-même.

Participation des peuples autochtones

(2) Sont placées à l'ordre du jour de la conférence visée au paragraphe (1) les questions constitutionnelles qui intéressent directement les peuples autochtones du Canada, notamment la détermination et la définition des droits de ces peuples à inscrire dans la Constitution du Canada. Le premier ministre du Canada invite leurs représentants à participer aux travaux relatifs à ces questions.

Participation des territoires

(3) Le premier ministre du Canada invite des représentants élus des gouvernements du territoire du Yukon et des territoires du Nord-Ouest à participer aux travaux relatifs à toute question placée à l'ordre du jour de la conférence visée au paragraphe (1) et qui, selon lui, intéresse directement le territoire du Yukon et les territoires du Nord-Ouest.

PARTIE V

PROCÉDURE DE MODIFICATION DE LA CONSTITUTION DU CANADA

Procédure normale de modification

38. (1) La Constitution du Canada peut être modifiée par proclamation du gouverneur général sous le grand sceau du Canada, autorisée à la fois :

a) par des résolutions du Sénat et de la Chambre des communes;

b) par des résolutions des assemblées législatives d'au moins deux tiers des provinces dont la population confondue représente, selon le recensement général le plus récent à l'époque, au moins cinquante pour cent de la population de toutes les provinces.

Majorité simple

(2) Une modification faite conformément au paragraphe (1) mais dérogatoire à la compétence législative, aux droits de propriété ou à tous

of the legislature or government of a province shall require a resolution supported by a majority of the members of each of the Senate, the House of Commons and the legislative assemblies required under subsection (1).

Expression of dissent

(3) An amendment referred to in subsection (2) shall not have effect in a province the legislative assembly of which has expressed its dissent thereto by resolution supported by a majority of its members prior to the issue of the proclamation to which the amendment relates unless that legislative assembly, subsequently, by resolution supported by a majority of its members, revokes its dissent and authorizes the amendment.

Revocation of dissent

(4) A resolution of dissent made for the purposes of subsection (3) may be revoked at any time before or after the issue of the proclamation to which it relates.

Restriction on proclamation

39. (1) A proclamation shall not be issued under subsection 38(1) before the expiration of one year from the adoption of the resolution initiating the amendment procedure thereunder, unless the legislative assembly of each province has previously adopted a resolution of assent or dissent.

Idem

(2) A proclamation shall not be issued under subsection 38(1) after the expiration of three years from the adoption of the resolution initiating the amendment procedure thereunder.

Compensation

40. Where an amendment is made under subsection 38(1) that transfers provincial legislative powers relating to education or other cultural matters from provincial legislatures to Parliament, Canada shall provide reasonable compensation to any province to which the amendment does not apply.

Amendment by unanimous consent

41. An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of

autres droits ou privilèges d'une législature ou d'un gouvernement provincial exige une résolution adoptée à la majorité des sénateurs, des députés fédéraux et des députés de chacune des assemblées législatives du nombre requis de provinces.

Désaccord

(3) La modification visée au paragraphe (2) est sans effet dans une province dont l'assemblée législative a, avant la prise de la proclamation, exprimé son désaccord par une résolution adoptée à la majorité des députés, sauf si cette assemblée, par résolution également adoptée à la majorité, revient sur son désaccord et autorise la modification.

Levée du désaccord

(4) La résolution de désaccord visée au paragraphe (3) peut être révoquée à tout moment, indépendamment de la date de la proclamation à laquelle elle se rapporte.

Restriction

39. (1) La proclamation visée au paragraphe 38(1) ne peut être prise dans l'année suivant l'adoption de la résolution à l'origine de la procédure de modification que si l'assemblée législative de chaque province a préalablement adopté une résolution d'agrément ou de désaccord.

Idem

(2) La proclamation visée au paragraphe 38(1) ne peut être prise que dans les trois ans suivant l'adoption de la résolution à l'origine de la procédure de modification.

Compensation

40. Le Canada fournit une juste compensation aux provinces auxquelles ne s'applique pas une modification faite conformément au paragraphe 38(1) et relative, en matière d'éducation ou dans d'autres domaines culturels, à un transfert de compétences législatives provinciales au Parlement.

Consentement unanime

41. Toute modification de la Constitution du Canada portant sur les questions suivantes se fait par proclamation du gouverneur général sous le grand sceau du Canada, autorisée par

Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:

(*a*) the office of the Queen, the Governor General and the Lieutenant Governor of a province;

(*b*) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;

(*c*) subject to section 43, the use of the English or the French language;

(*d*) the composition of the Supreme Court of Canada; and

(*e*) an amendment to this Part.

Amendment by general procedure

42. (1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):

(*a*) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;

(*b*) the powers of the Senate and the method of selecting Senators;

(*c*) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;

(*d*) subject to paragraph 41(*d*), the Supreme Court of Canada;

(*e*) the extension of existing provinces into the territories; and

(*f*) notwithstanding any other law or practice, the establishment of new provinces.

Exception

(2) Subsections 38(2) to (4) do not apply in respect of amendments in relation to matters referred to in subsection (1).

Amendment of provisions relating to some but not all provinces

43. An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including

(*a*) any alteration to boundaries between provinces, and

des résolutions du Sénat, de la Chambre des communes et de l'assemblée législative de chaque province :

a) la charge de Reine, celle de gouverneur général et celle de lieutenant-gouverneur;

b) le droit d'une province d'avoir à la Chambre des communes un nombre de députés au moins égal à celui des sénateurs par lesquels elle est habilitée à être représentée lors de l'entrée en vigueur de la présente partie;

c) sous réserve de l'article 43, l'usage du français ou de l'anglais;

d) la composition de la Cour suprême du Canada;

e) la modification de la présente partie.

Procédure normale de modification

42. (1) Toute modification de la Constitution du Canada portant sur les questions suivantes se fait conformément au paragraphe 38(1) :

a) le principe de la représentation proportionnelle des provinces à la Chambre des communes prévu par la Constitution du Canada;

b) les pouvoirs du Sénat et le mode de sélection des sénateurs;

c) le nombre des sénateurs par lesquels une province est habilitée à être représentée et les conditions de résidence qu'ils doivent remplir;

d) sous réserve de l'alinéa 41*d*), la Cour suprême du Canada;

e) le rattachement aux provinces existantes de tout ou partie des territoires;

f) par dérogation à toute autre loi ou usage, la création de provinces.

Exception

(2) Les paragraphes 38(2) à (4) ne s'appliquent pas aux questions mentionnées au paragraphe (1).

Modification à l'égard de certaines provinces

43. Les dispositions de la Constitution du Canada applicables à certaines provinces seulement ne peuvent être modifiées que par proclamation du gouverneur général sous le grand sceau du Canada, autorisée par des résolutions du Sénat, de la Chambre (*b*) any amendment to any provision that relates to the use of the English or the French language within a province,

may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.

des communes et de l'assemblée législative de chaque province concernée. Le présent article s'applique notamment :

a) aux changements du tracé des frontières interprovinciales;

b) aux modifications des dispositions relatives à l'usage du français ou de l'anglais dans une province.

Amendments by Parliament

44. Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.

Modification par le Parlement

44. Sous réserve des articles 41 et 42, le Parlement a compétence exclusive pour modifier les dispositions de la Constitution du Canada relatives au pouvoir exécutif fédéral, au Sénat ou à la Chambre des communes.

Amendments by provincial legislatures

45. Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.

Modification par les législatures

45. Sous réserve de l'article 41, une législature a compétence exclusive pour modifier la constitution de sa province.

Initiation of amendment procedures

46. (1) The procedures for amendment under sections 38, 41, 42 and 43 may be initiated either by the Senate or the House of Commons or by the legislative assembly of a province.

Initiative des procédures

46. (1) L'initiative des procédures de modification visées aux articles 38, 41, 42 et 43 appartient au Sénat, à la Chambre des communes ou à une assemblée législative.

Revocation of authorization

(2) A resolution of assent made for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.

Possibilité de révocation

(2) Une résolution d'agrément adoptée dans le cadre de la présente partie peut être révoquée à tout moment avant la date de la proclamation qu'elle autorise.

Amendments without Senate resolution

47. (1) An amendment to the Constitution of Canada made by proclamation under section 38, 41, 42 or 43 may be made without a resolution of the Senate authorizing the issue of the proclamation if, within one hundred and eighty days after the adoption by the House of Commons of a resolution authorizing its issue, the Senate has not adopted such a resolution and if, at any time after the expiration of that period, the House of Commons again adopts the resolution.

Modification sans résolution du Sénat

47. (1) Dans les cas visés à l'article 38, 41, 42 ou 43, il peut être passé outre au défaut d'autorisation du Sénat si celui-ci n'a pas adopté de résolution dans un délai de cent quatre-vingts jours suivant l'adoption de celle de la Chambre des communes et si cette dernière, après l'expiration du délai, adopte une nouvelle résolution dans le même sens.

Computation of period

(2) Any period when Parliament is prorogued or dissolved shall not be counted in computing the one hundred and eighty day period referred to in subsection (1).

Computation du délai

(2) Dans la computation du délai visé au paragraphe (1), ne sont pas comptées les périodes pendant lesquelles le Parlement est prorogé ou dissous.

Advice to issue proclamation

48. The Queen's Privy Council for Canada shall advise the Governor General to issue a proclamation under this Part forthwith on the adoption of the resolutions required for an amendment made by proclamation under this Part.

Constitutional conference

49. A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within fifteen years after this Part comes into force to review the provisions of this Part.

PART VI

AMENDMENT TO THE CONSTITUTION ACT, 1867

Amendment to *Constitution Act, 1867*

50. The *Constitution Act, 1867* (formerly named the *British North America Act, 1867*) is amended by adding thereto, immediately after section 92 thereof, the following heading and section:

"Non-Renewable Natural Resources, Forestry Resources and Electrical Energy

Laws respecting non-renewable natural resources, forestry resources and electrical energy

92A. (1) In each province, the legislature may exclusively make laws in relation to

(*a*) exploration for non-renewable natural resources in the province;

(*b*) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(*c*) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

Export from provinces of resources

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry

Demande de proclamation

48. Le Conseil privé de la Reine pour le Canada demande au gouverneur général de prendre, conformément à la présente partie, une proclamation dès l'adoption des résolutions prévues par cette partie pour une modification par proclamation.

Conférence constitutionnelle

49. Dans les quinze ans suivant l'entrée en vigueur de la présente partie, le premier ministre du Canada convoque une conférence constitutionnelle réunissant les premiers ministres provinciaux et lui-même, en vue du réexamen des dispositions de cette partie.

PARTIE VI

MODIFICATION DE LA LOI CONSTITUTIONNELLE DE 1867

Modification de la *Loi constitutionnelle de 1867*

50. La *Loi constitutionnelle de 1867* (antérieurement désignée sous le titre : *Acte de l'Amérique du Nord britannique, 1867*) est modifiée par insertion, après l'article 92, de la rubrique et de l'article suivants :

«Ressources naturelles non renouvelables, ressources forestières et énergie électrique

Compétence provinciale

92A. (1) La législature de chaque province a compétence exclusive pour légiférer dans les domaines suivants :

a) prospection des ressources naturelles non renouvelables de la province;

b) exploitation, conservation et gestion des ressources naturelles non renouvelables et des ressources forestières de la province, y compris leur rythme de production primaire;

c) aménagement, conservation et gestion des emplacements et des installations de la province destinés à la production d'énergie électrique.

Exportation hors des provinces

(2) La législature de chaque province a compétence pour légiférer en ce qui concerne l'exportation, hors de la province, à destination d'une autre partie du Canada, de la production primaire tirée des

resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

Authority of Parliament

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

Taxation of resources

(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

(*a*) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and

(*b*) sites and facilities in the province for the generation of electrical energy and the production therefrom,

whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

"Primary production"

(5) The expression "primary production" has the meaning assigned by the Sixth Schedule.

Existing powers or rights

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section."

ressources naturelles non renouvelables et des ressources forestières de la province, ainsi que de la production d'énergie électrique de la province, sous réserve de ne pas adopter de lois autorisant ou prévoyant des disparités de prix ou des disparités dans les exportations destinées à une autre partie du Canada.

Pouvoir du Parlement

(3) Le paragraphe (2) ne porte pas atteinte au pouvoir du Parlement de légiférer dans les domaines visés à ce paragraphe, les dispositions d'une loi du Parlement adoptée dans ces domaines l'emportant sur les dispositions incompatibles d'une loi provinciale.

Taxation des ressources

(4) La législature de chaque province a compétence pour prélever des sommes d'argent par tout mode ou système de taxation :

a) des ressources naturelles non renouvelables et des ressources forestières de la province, ainsi que de la production primaire qui en est tirée;

b) des emplacements et des installations de la province destinés à la production d'énergie électrique, ainsi que de cette production même.

Cette compétence peut s'exercer indépendamment du fait que la production en cause soit ou non, en totalité ou en partie, exportée hors de la province, mais les lois adoptées dans ces domaines ne peuvent autoriser ou prévoir une taxation qui établisse une distinction entre la production exportée à destination d'une autre partie du Canada et la production non exportée hors de la province.

«Production primaire»

(5) L'expression «production primaire» a le sens qui lui est donné dans la sixième annexe.

Pouvoirs ou droits existants

(6) Les paragraphes (1) à (5) ne portent pas atteinte aux pouvoirs ou droits détenus par la législature ou le gouvernement d'une province lors de l'entrée en vigueur du présent article.»

Idem

51. The said Act is further amended by adding thereto the following Schedule:

"THE SIXTH SCHEDULE

Primary Production from Non-Renewable Natural Resources and Forestry Resources

1. For the purposes of section 92A of this Act,

(*a*) production from a non-renewable natural resource is primary production therefrom if

(i) it is in the form in which it exists upon its recovery or severance from its natural state, or

(ii) it is a product resulting from processing or refining the resource, and is not a manufactured product or a product resulting from refining crude oil, refining upgraded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil; and

(*b*) production from a forestry resource is primary production therefrom if it consists of sawlogs, poles, lumber, wood chips, sawdust or any other primary wood product, or wood pulp, and is not a product manufactured from wood."

PART VII

GENERAL

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Constitution of Canada

(2) The Constitution of Canada includes

(*a*) the *Canada Act 1982*, including this Act;

(*b*) the Acts and orders referred to in the schedule; and

Idem

51. Ladite loi est en outre modifiée par adjonction de l'annexe suivante :

«SIXIÈME ANNEXE

Production primaire tirée des ressources naturelles non renouvelables et des ressources forestières

1. Pour l'application de l'article 92A :

a) on entend par production primaire tirée d'une ressource naturelle non renouvelable :

(i) soit le produit qui se présente sous la même forme que lors de son extraction du milieu naturel,

(ii) soit le produit non manufacturé de la transformation, du raffinage ou de l'affinage d'une ressource, à l'exception du produit du raffinage du pétrole brut, du raffinage du pétrole brut lourd amélioré, du raffinage des gaz ou des liquides dérivés du charbon ou du raffinage d'un équivalent synthétique du pétrole brut;

b) on entend par production primaire tirée d'une ressource forestière la production constituée de billots, de poteaux, de bois d'œuvre, de copeaux, de sciure ou d'autre produit primaire du bois, ou de pâte de bois, à l'exception d'un produit manufacturé en bois.»

PARTIE VII

DISPOSITIONS GÉNÉRALES

Primauté de la Constitution du Canada

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

Constitution du Canada

(2) La Constitution du Canada comprend :

a) la *Loi de 1982 sur le Canada*, y compris la présente loi;

b) les textes législatifs et les décrets figurant à l'annexe;

(*c*) any amendment to any Act or order referred to in paragraph (*a*) or (*b*).

Amendments to Constitution of Canada

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

Repeals and new names

53. (1) The enactments referred to in Column I of the schedule are hereby repealed or amended to the extent indicated in Column II thereof and, unless repealed, shall continue as law in Canada under the names set out in Column III thereof.

Consequential amendments

(2) Every enactment, except the *Canada Act 1982*, that refers to an enactment referred to in the schedule by the name in Column I thereof is hereby amended by substituting for that name the corresponding name in Column III thereof, and any British North America Act not referred to in the schedule may be cited as the *Constitution Act* followed by the year and number, if any, of its enactment.

Repeal and consequential amendments

54. Part IV is repealed on the day that is one year after this Part comes into force and this section may be repealed and this Act renumbered, consequentially upon the repeal of Part IV and this section, by proclamation issued by the Governor General under the Great Seal of Canada.

French version of Constitution of Canada

55. A French version of the portions of the Constitution of Canada referred to in the schedule shall be prepared by the Minister of Justice of Canada as expeditiously as possible and, when any portion thereof sufficient to warrant action being taken has been so prepared, it shall be put forward for enactment by proclamation issued by the Governor General under the Great Seal of Canada pursuant to the procedure then applicable to an amendment of the same provisions of the Constitution of Canada.

c) les modifications des textes législatifs et des décrets mentionnés aux alinéas *a*) ou *b*).

Modification

(3) La Constitution du Canada ne peut être modifiée que conformément aux pouvoirs conférés par elle.

Abrogation et nouveaux titres

53. (1) Les textes législatifs et les décrets énumérés à la colonne I de l'annexe sont abrogés ou modifiés dans la mesure indiquée à la colonne II. Sauf abrogation, ils restent en vigueur en tant que lois du Canada sous les titres mentionnés à la colonne III.

Modifications corrélatives

(2) Tout texte législatif ou réglementaire, sauf la *Loi de 1982 sur le Canada*, qui fait mention d'un texte législatif ou décret figurant à l'annexe par le titre indiqué à la colonne I est modifié par substitution à ce titre du titre correspondant mentionné à la colonne III; tout Acte de l'Amérique du Nord britannique non mentionné à l'annexe peut être cité sous le titre de *Loi constitutionnelle* suivi de l'indication de l'année de son adoption et éventuellement de son numéro.

Abrogation et modifications qui en découlent

54. La partie IV est abrogée un an après l'entrée en vigueur de la présente partie et le gouverneur général peut, par proclamation sous le grand sceau du Canada, abroger le présent article et apporter en conséquence de cette double abrogation les aménagements qui s'imposent à la présente loi.

Version française de certains textes constitutionnels

55. Le ministre de la Justice du Canada est chargé de rédiger, dans les meilleurs délais, la version française des parties de la Constitution du Canada qui figurent à l'annexe; toute partie suffisamment importante est, dès qu'elle est prête, déposée pour adoption par proclamation du gouverneur général sous le grand sceau du Canada, conformément à la procédure applicable à l'époque à la modification des dispositions constitutionnelles qu'elle contient.

English and French versions of certain constitutional texts	**56.** Where any portion of the Constitution of Canada has been or is enacted in English and French or where a French version of any portion of the Constitution is enacted pursuant to section 55, the English and French versions of that portion of the Constitution are equally authoritative.	**56.** Les versions française et anglaise des parties de la Constitution du Canada adoptées dans ces deux langues ont également force de loi. En outre, ont également force de loi, dès l'adoption, dans le cadre de l'article 55, d'une partie de la version française de la Constitution, cette partie et la version anglaise correspondante.	Versions française et anglaise de certains textes constitutionnels
English and French versions of this Act	**57.** The English and French versions of this Act are equally authoritative.	**57.** Les versions française et anglaise de la présente loi ont également force de loi.	Versions française et anglaise de la présente loi
Commencement	**58.** Subject to section 59, this Act shall come into force on a day to be fixed by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.	**58.** Sous réserve de l'article 59, la présente loi entre en vigueur à la date fixée par proclamation de la Reine ou du gouverneur général sous le grand sceau du Canada.	Entrée en vigueur
Commencement of paragraph 23(1)(*a*) in respect of Quebec	**59.** (1) Paragraph 23(1)(*a*) shall come into force in respect of Quebec on a day to be fixed by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.	**59.** (1) L'alinéa 23(1)*a*) entre en vigueur pour le Québec à la date fixée par proclamation de la Reine ou du gouverneur général sous le grand sceau du Canada.	Entrée en vigueur de l'alinéa 23(1)*a*) pour le Québec
Authorization of Quebec	(2) A proclamation under subsection (1) shall be issued only where authorized by the legislative assembly or government of Quebec.	(2) La proclamation visée au paragraphe (1) ne peut être prise qu'après autorisation de l'assemblée législative ou du gouvernement du Québec.	Autorisation du Québec
Repeal of this section	(3) This section may be repealed on the day paragraph 23(1)(*a*) comes into force in respect of Quebec and this Act amended and renumbered, consequentially upon the repeal of this section, by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.	(3) Le présent article peut être abrogé à la date d'entrée en vigueur de l'alinéa 23(1)*a*) pour le Québec, et la présente loi faire l'objet, dès cette abrogation, des modifications et changements de numérotation qui en découlent, par proclamation de la Reine ou du gouverneur général sous le grand sceau du Canada.	Abrogation du présent article
Short title and citations	**60.** This Act may be cited as the *Constitution Act, 1982*, and the Constitution Acts 1867 to 1975 (No. 2) and this Act may be cited together as the *Constitution Acts, 1867 to 1982*.	**60.** Titre abrégé de la présente annexe : *Loi constitutionnelle de 1982*; titre commun des lois constitutionnelles de 1867 à 1975 (n° 2) et de la présente loi : *Lois constitutionnelles de 1867 à 1982*.	Titres

SCHEDULE

to the

CONSTITUTION ACT, 1982

MODERNIZATION OF THE CONSTITUTION

Item	Column I Act Affected	Column II Amendment	Column III New Name
1.	British North America Act, 1867, 30-31 Vict., c. 3 (U.K.)	(1) Section 1 is repealed and the following substituted therefor: "1. This Act may be cited as the *Constitution Act, 1867*." (2) Section 20 is repealed. (3) Class 1 of section 91 is repealed. (4) Class 1 of section 92 is repealed.	Constitution Act, 1867
2.	An Act to amend and continue the Act 32-33 Victoria chapter 3; and to establish and provide for the Government of the Province of Manitoba, 1870, 33 Vict., c. 3 (Can.)	(1) The long title is repealed and the following substituted therefor: "*Manitoba Act, 1870*." (2) Section 20 is repealed.	Manitoba Act, 1870
3.	Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territory into the union, dated the 23rd day of June, 1870		Rupert's Land and North-Western Territory Order
4.	Order of Her Majesty in Council admitting British Columbia into the Union, dated the 16th day of May, 1871		British Columbia Terms of Union
5.	British North America Act, 1871, 34-35 Vict., c. 28 (U.K.)	Section 1 is repealed and the following substituted therefor: "1. This Act may be cited as the *Constitution Act, 1871*."	Constitution Act, 1871
6.	Order of Her Majesty in Council admitting Prince Edward Island into the Union, dated the 26th day of June, 1873		Prince Edward Island Terms of Union
7.	Parliament of Canada Act, 1875, 38-39 Vict., c. 38 (U.K.)		Parliament of Canada Act, 1875
8.	Order of Her Majesty in Council admitting all British possessions and Territories in North America and islands adjacent thereto into the Union, dated the 31st day of July, 1880		Adjacent Territories Order

ANNEXE

LOI CONSTITUTIONNELLE DE 1982

ACTUALISATION DE LA CONSTITUTION

	Colonne I Loi visée	Colonne II Modification	Colonne III Nouveau titre
1.	**Acte de l'Amérique du Nord britannique, 1867, 30-31 Vict., c. 3 (R.-U.)**	(1) L'article 1 est abrogé et remplacé par ce qui suit : «1. Titre abrégé : *Loi constitutionnelle de 1867*.» (2) L'article 20 est abrogé. (3) La catégorie 1 de l'article 91 est abrogée. (4) La catégorie 1 de l'article 92 est abrogée.	Loi constitutionnelle de 1867
2.	**Acte pour amender et continuer l'acte trente-deux et trente-trois Victoria, chapitre trois, et pour établir et constituer le gouvernement de la province de Manitoba, 1870, 33 Vict., c. 3 (Canada)**	(1) Le titre complet est abrogé et remplacé par ce qui suit : «*Loi de 1870 sur le Manitoba*.» (2) L'article 20 est abrogé.	Loi de 1870 sur le Manitoba
3.	**Arrêté en conseil de Sa Majesté admettant la Terre de Rupert et le Territoire du Nord-Ouest, en date du 23 juin 1870**		Décret en conseil sur la terre de Rupert et le territoire du Nord-Ouest
4.	**Arrêté en conseil de Sa Majesté admettant la Colombie-Britannique, en date du 16 mai 1871**		Conditions de l'adhésion de la Colombie-Britannique
5.	**Acte de l'Amérique du Nord britannique, 1871, 34-35 Vict., c. 28 (R.-U.)**	L'article 1 est abrogé et remplacé par ce qui suit : «1. Titre abrégé : *Loi constitutionnelle de 1871*.»	Loi constitutionnelle de 1871
6.	**Arrêté en conseil de Sa Majesté admettant l'Île-du-Prince-Édouard, en date du 26 juin 1873**		Conditions de l'adhésion de l'Île-du-Prince-Édouard
7.	**Acte du Parlement du Canada, 1875, 38-39 Vict., c. 38 (R.-U.)**		Loi de 1875 sur le Parlement du Canada
8.	**Arrêté en conseil de Sa Majesté admettant dans l'Union tous les territoires et possessions britanniques dans l'Amérique du Nord, et les îles adjacentes à ces territoires et possessions, en date du 31 juillet 1880**		Décret en conseil sur les territoires adjacents

SCHEDULE

to the

CONSTITUTION ACT, 1982—*Continued*

Item	Column I Act Affected	Column II Amendment	Column III New Name
9.	British North America Act, 1886, 49-50 Vict., c. 35 (U.K.)	Section 3 is repealed and the following substituted therefor: "3. This Act may be cited as the *Constitution Act, 1886*."	Constitution Act, 1886
10.	Canada (Ontario Boundary) Act, 1889, 52-53 Vict., c. 28 (U.K.)		Canada (Ontario Boundary) Act, 1889
11.	Canadian Speaker (Appointment of Deputy) Act, 1895, 2nd Sess., 59 Vict., c. 3 (U.K.)	The Act is repealed.	
12.	The Alberta Act, 1905, 4-5 Edw. VII, c. 3 (Can.)		Alberta Act
13.	The Saskatchewan Act, 1905, 4-5 Edw. VII, c. 42 (Can.)		Saskatchewan Act
14.	British North America Act, 1907, 7 Edw. VII, c. 11 (U.K.)	Section 2 is repealed and the following substituted therefor: "2. This Act may be cited as the *Constitution Act, 1907*."	Constitution Act, 1907
15.	British North America Act, 1915, 5-6 Geo. V, c. 45 (U.K.)	Section 3 is repealed and the following substituted therefor: "3. This Act may be cited as the *Constitution Act, 1915*."	Constitution Act, 1915
16.	British North America Act, 1930, 20-21 Geo. V, c. 26 (U.K.)	Section 3 is repealed and the following substituted therefor: "3. This Act may be cited as the *Constitution Act, 1930*."	Constitution Act, 1930
17.	Statute of Westminster, 1931, 22 Geo. V, c. 4 (U.K.)	In so far as they apply to Canada, (*a*) section 4 is repealed; and (*b*) subsection 7(1) is repealed.	Statute of Westminster, 1931

ANNEXE (*suite*)

LOI CONSTITUTIONNELLE DE 1982

	Colonne I Loi visée	Colonne II Modification	Colonne III Nouveau titre
9.	Acte de l'Amérique du Nord britannique, 1886, 49-50 Vict., c. 35 (R.-U.)	L'article 3 est abrogé et remplacé par ce qui suit : «3. Titre abrégé : *Loi constitutionnelle de 1886.*»	Loi constitutionnelle de 1886
10.	Acte du Canada (limites d'Ontario) 1889, 52-53 Vict., c. 28 (R.-U.)		Loi de 1889 sur le Canada (frontières de l'Ontario)
11.	Acte concernant l'Orateur canadien (nomination d'un suppléant) 1895, 2^e session, 59 Vict., c. 3 (R.-U.)	La loi est abrogée.	
12.	Acte de l'Alberta, 1905, 4-5 Ed. VII, c. 3 (Canada)		Loi sur l'Alberta
13.	Acte de la Saskatchewan, 1905, 4-5 Ed. VII, c. 42 (Canada)		Loi sur la Saskatchewan
14.	Acte de l'Amérique du Nord britannique, 1907, 7 Ed. VII, c. 11 (R.-U.)	L'article 2 est abrogé et remplacé par ce qui suit : «2. Titre abrégé : *Loi constitutionnelle de 1907.*»	Loi constitutionnelle de 1907
15.	Acte de l'Amérique du Nord britannique, 1915, 5-6 Geo. V, c. 45 (R.-U.)	L'article 3 est abrogé et remplacé par ce qui suit : «3. Titre abrégé : *Loi constitutionnelle de 1915.*»	Loi constitutionnelle de 1915
16.	Acte de l'Amérique du Nord britannique, 1930, 20-21 Geo. V, c. 26 (R.-U.)	L'article 3 est abrogé et remplacé par ce qui suit : «3. Titre abrégé : *Loi constitutionnelle de 1930.*»	Loi constitutionnelle de 1930
	Statut de Westminster, 1931, 22 Geo. V, c. 4 (R.-U.)	Dans la mesure où ils s'appliquent au Canada : *a*) l'article 4 est abrogé; *b*) le paragraphe 7(1) est abrogé.	Statut de Westminster de 1931

SCHEDULE

to the

CONSTITUTION ACT, 1982 *Continued*

Item	Column I Act Affected	Column II Amendment	Column III New Name
18.	British North America Act, 1940, 3-4 Geo. VI, c. 36 (U.K.)	Section 2 is repealed and the following substituted therefor: "2. This Act may be cited as the *Constitution Act, 1940*."	Constitution Act, 1940
19.	British North America Act, 1943, 6-7 Geo. VI, c. 30 (U.K.)	The Act is repealed.	
20.	British North America Act, 1946, 9-10 Geo. VI, c. 63 (U.K.)	The Act is repealed.	
21.	British North America Act, 1949, 12-13 Geo. VI, c. 22 (U.K.)	Section 3 is repealed and the following substituted therefor: "3. This Act may be cited as the *Newfoundland Act*."	Newfoundland Act
22.	British North America (No. 2) Act, 1949, 13 Geo. VI, c. 81 (U.K.)	The Act is repealed.	
23.	British North America Act, 1951, 14-15 Geo. VI, c. 32 (U.K.)	The Act is repealed.	
24.	British North America Act, 1952, 1 Eliz. II, c. 15 (Can.)	The Act is repealed.	
25.	British North America Act, 1960, 9 Eliz. II, c. 2 (U.K.)	Section 2 is repealed and the following substituted therefor: "2. This Act may be cited as the *Constitution Act, 1960*."	Constitution Act, 1960
26.	British North America Act, 1964, 12-13 Eliz. II, c. 73 (U.K.)	Section 2 is repealed and the following substituted therefor: "2. This Act may be cited as the *Constitution Act, 1964*."	Constitution Act, 1964

ANNEXE (*suite*)

LOI CONSTITUTIONNELLE DE 1982

	Colonne I Loi visée	Colonne II Modification	Colonne III Nouveau titre
18.	Acte de l'Amérique du Nord britannique, 1940, 3-4 Geo. VI, c. 36 (R.-U.)	L'article 2 est abrogé et remplacé par ce qui suit : «2. Titre abrégé : *Loi constitutionnelle de 1940*.»	Loi constitutionnelle de 1940
19.	Acte de l'Amérique du Nord britannique, 1943, 6-7 Geo. VI, c. 30 (R.-U.)	La loi est abrogée.	
20.	Acte de l'Amérique du Nord britannique, 1946, 9-10 Geo. VI, c. 63 (R.-U.)	La loi est abrogée.	
21.	Acte de l'Amérique du Nord britannique, 1949, 12-13 Geo. VI, c. 22 (R.-U.)	L'article 3 est abrogé et remplacé par ce qui suit : «3. Titre abrégé : *Loi sur Terre-Neuve*.»	Loi sur Terre-Neuve
22.	Acte de l'Amérique du Nord britannique (N° 2), 1949, 13 Geo. VI, c. 81 (R.-U.)	La loi est abrogée.	
23.	Acte de l'Amérique du Nord britannique, 1951, 14-15 Geo. VI, c. 32 (R.-U.)	La loi est abrogée.	
24.	Acte de l'Amérique du Nord britannique, 1952, 1 Eliz. II, c. 15 (Canada)	La loi est abrogée.	
25.	Acte de l'Amérique du Nord britannique, 1960, 9 Eliz. II, c. 2 (R.-U.)	L'article 2 est abrogé et remplacé par ce qui suit : «2. Titre abrégé : *Loi constitutionnelle de 1960*.»	Loi constitutionnelle de 1960
26.	Acte de l'Amérique du Nord britannique, 1964, 12-13 Eliz. II, c. 73 (R.-U.)	L'article 2 est abrogé et remplacé par ce qui suit : «2. Titre abrégé : *Loi constitutionnelle de 1964*.»	Loi constitutionnelle de 1964

SCHEDULE
to the
CONSTITUTION ACT, 1982 *Concluded*

Item	Column I Act Affected	Column II Amendment	Column III New Name
27.	British North America Act, 1965, 14 Eliz. II, c. 4, Part I (Can.)	Section 2 is repealed and the following substituted therefor: "2. This Part may be cited as the *Constitution Act, 1965*."	Constitution Act, 1965
28.	British North America Act, 1974, 23 Eliz. II, c. 13, Part I (Can.)	Section 3, as amended by 25-26 Eliz. II, c. 28, s. 38(1) (Can.), is repealed and the following substituted therefor: "3. This Part may be cited as the *Constitution Act, 1974*."	Constitution Act, 1974
29.	British North America Act, 1975, 23-24 Eliz. II, c. 28, Part I (Can.)	Section 3, as amended by 25-26 Eliz. II, c. 28, s. 31 (Can.), is repealed and the following substituted therefor: "3. This Part may be cited as the *Constitution Act (No. 1), 1975*."	Constitution Act (No. 1), 1975
30.	British North America Act (No. 2), 1975, 23-24 Eliz. II, c. 53 (Can.)	Section 3 is repealed and the following substituted therefor: "3. This Act may be cited as the *Constitution Act (No. 2), 1975*."	Constitution Act (No. 2), 1975

ANNEXE (*fin*)

LOI CONSTITUTIONNELLE DE 1982

	Colonne I Loi visée	Colonne II Modification	Colonne III Nouveau titre
27.	Acte de l'Amérique du Nord britannique, 1965, 14 Eliz. II, c. 4, Partie I (Canada)	L'article 2 est abrogé et remplacé par ce qui suit : «2. Titre abrégé de la présente partie : *Loi constitutionnelle de 1965*.»	Loi constitutionnelle de 1965
28.	Acte de l'Amérique du Nord britannique, 1974, 23 Eliz. II, c. 13, Partie I (Canada)	L'article 3, modifié par le paragraphe 38(1) de la loi 25-26 Elizabeth II, c. 28 (Canada), est abrogé et remplacé par ce qui suit : «3. Titre abrégé de la présente partie : *Loi constitutionnelle de 1974*.»	Loi constitutionnelle de 1974
29.	Acte de l'Amérique du Nord britannique, 1975, 23-24 Eliz. II, c. 28, Partie I (Canada)	L'article 3, modifié par l'article 31 de la loi 25-26 Elizabeth II, c. 28 (Canada), est abrogé et remplacé par ce qui suit : «3. Titre abrégé de la présente partie : *Loi constitutionnelle nº 1 de 1975*.»	Loi constitutionnelle nº 1 de 1975
30.	Acte de l'Amérique du Nord britannique nº 2, 1975, 23-24 Eliz. II, c. 53 (Canada)	L'article 3 est abrogé et remplacé par ce qui suit : «3. Titre abrégé : *Loi constitutionnelle nº 2 de 1975*.»	Loi constitutionnelle nº 2 de 1975

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Créé en 1972, l'Institut de recherches politiques est un organisme national dont l'indépendance et l'autonomie sont assurées grâce à des revenus provenant d'un fonds de dotation auquel souscrivent les gouvernements fédéral et provinciaux ainsi que le secteur privé. L'Institut obtient en outre des subventions et des contrats des gouvernements, des compagnies et des fondations afin de réaliser certains projets de recherche.

La raison d'être de l'Institut est triple :

— Servir de catalyseur au sein de la collectivité nationale en favorisant un débat public éclairé sur les principales questions d'intérêt général.

— Stimuler la participation de tous les éléments de la collectivité nationale à l'élaboration de la politique d'État.

— Trouver des solutions réalisables aux importants problèmes d'ordre politique afin de contribuer à l'élaboration d'une saine politique d'État.

Un conseil d'administration, chargé de la décision, et une commission de direction, responsable d'éclairer le conseil sur l'orientation de la recherche, assurent la direction de l'Institut. L'administration courante des politiques, des programmes et du personnel relève du président.

L'Institut fonctionne de manière décentralisée et retient les services de chercheurs en divers points du Canada, s'assurant ainsi que toutes les régions contribuent aux recherches.

L'Institut cherche à favoriser, dans la mesure du possible, la compréhension et la discussion publiques des questions d'envergure nationale, controversées ou non. Il publie les conclusions de ses recherches avec clarté et impartialité. Les recommandations ou les conclusions énoncées dans les publications de l'Institut sont strictement celles de l'auteur et n'engagent aucunement le conseil d'administration, la commission de direction ou les bailleurs de fonds.

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Canada and the New Constitution

The Unfinished Agenda

These volumes present an outspoken review of some of the critical national issues involved in constitutional change under Canada's promised 'renewed federalism'.

Canada's Constitution has now been 'patriated', an amending formula is in place, and a Charter of Rights has been adopted. But the unfinished agenda of constitutional change that alone can unify "this most fractious of federal states" is not much different now from what it seemed to be before 'patriation'.

It will be the part of wisdom — and of justice — to return at some time to the discussion of constitutional change and renewal. To this discussion these volumes can make an important contribution.

En 1978, un groupe d'hommes et de femmes intéressés ont pris l'initiative de faire connaitre leurs opinions face aux questions d'intérêt national entourant les quatre options prévues dans le cadre du changement constitutionnel découlant de la promesse d'un nouveau fédéralisme canadien.

Depuis, la constitution canadienne a été rapatriée, une formule d'amendement a été conçue et une Charte des droits a été promulguée. Mais l'ordre du jour inachevé du changement constitutionnel qui seul peut unifier cet État fédéral si indocile ne diffère pas tellement aujourd'hui de ce qu'il semblait être en 1978.

Il ne serait que sage — et juste — de reprendre, dans un avenir plus ou moins rapproché, la discussion du changement et du renouveau constitutionnels.

Si ces volumes peuvent aider à la réflexion et à la discussion entourant les problèmes qui demeurent, ils auront atteint leur principal objectif.

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